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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 652

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG INC., *Respondent*
[Accounting Case]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THURMAN ARNOLD
MILTON V. FREEMAN
EDGAR H. BRENNER
WERNER J. KRONSTEIN
Arnold, Fortas & Porter
1229 19th Street, N. W.
Washington 6, D. C.
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Farbenfabriken Bayer A.G., petitioner herein, by its attorneys, prays that a writ of certiorari issue to the Court of Appeals for the Third Circuit to review the decision of that Court in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the Judgment of the District Court, reported at 307 F.2d 210, is appended hereto as Appendix A, p. 1a.

The opinion of the United States District Court for the District of New Jersey granting respondent's motion for summary judgment and denying petitioner's cross-motion reported at 197 F. Supp. 613, is appended hereto as Appendix B, p. 8a.

JURISDICTION

This case seeks review from a Judgment of the United States Court of Appeals for the Third Circuit entered on August 9, 1962. A Petition for Rehearing was filed on August 24, 1962 and was denied on September 11, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can respondent appropriate to its own use property rights of petitioner, in a joint business with respondent in the sale of aspirin in Latin America, merely because the agreement, within the framework of which such business was conducted between the two world wars, contained a prohibition of competition by the parties with the joint business?

2. Can property rights of petitioner, as beneficial owner of corporate stocks in jointly held companies, be appropriated by respondent for its own use on the ground that such shares were paid for, and payment therefore was accepted by respondent, out of profits

of a joint business, with which petitioner and respondent, the partners in such business, were restrained from competing?

3. Can final or the lump sum payment of amount due on an accounting for property interests in joint businesses now terminated be considered as "enforcing the precise conduct made unlawful by the Act" as defined in this Court's decision in the *Kelly* v. *Kosuga* and similar cases?

4. Can the defense of illegality under the antitrust laws be permitted to result in the unjust enrichment of respondent where the fact that the agreement contained a provision in violation of the antitrust laws could not have been known to the parties at the time the agreement was concluded in 1920, but became evident only as a result of the much later development of the antitrust laws through their administrative and judicial interpretation?

5. Is the defense of illegality under the antitrust laws available to a party to an agreement who has coerced the other party to enter into the agreement?

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §1 reads in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *"

STATEMENT OF THE CASE

Petitioner, Farbenfabriken Bayer A.G., is a corporation organized under the laws of the Federal Republic of Germany. It was established in 1953 as a successor to I.G. Farbenindustrie, A.G. (hereinafter referred to as I.G. Farben). I.G. Farben in 1925 had succeeded to the business conducted since 1863 by Farbenfabriken vorm. Friedrich Bayer & Co. (Stipulation 2, App. 62a).[1]

Respondent herein is Sterling Drug Inc., a corporation organized under the laws of Delaware. It is the legal successor to Sterling Products, Inc., and to the Bayer Company, Inc., a New York corporation (hereinafter referred to as "New York Bayer"). New York Bayer was a subsidiary first of petitioner and later of respondent. It was merged into the respondent in 1942.[2] (Stipulation 3, App. 61a)

Petitioner, German Bayer, is a large German chemical firm. It and its predecessors have been in business since 1863. Its name is associated with the discovery of aspirin.

Prior to the outbreak of World War I, German Bayer, through its local Latin American subsidiaries,

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[1] For convenience petitioner and its predecessors, I.G. Farben and Farbenfabriken vorm. Friedrich Bayer & Co., are hereinafter sometimes referred to individually or collectively as "petitioner" or as "German Bayer."

The succession of petitioner to I.G. Farben, though denied by respondent, was assumed by both the District Court and the Court of Appeals and accordingly is not in issue on the present petition.

[2] Sterling Drug Inc., and its predecessors or subsidiaries are hereinafter sometimes referred to either individually or collectively as "respondent" or as "Sterling."

built up a well-established and valuable pharmaceutical business in Latin America. A very important part of this business was the sale of aspirin products under the trademarks "Bayer," "Bayer" spelled in a cross form with a circle (hereinafter referred to as the Bayer Cross), and "Aspirin," still a valuable trademark in most of the Latin American countries.[a] (App. 16a)

Sterling, on the other hand, did not, prior to World War I, conduct any aspirin business in Latin America. Sterling was not then in any way connected with German Bayer, nor did it have any rights to the Bayer trademarks. (Stipulation 4, 5, App. 61a)

Sterling came into the picture only after the outbreak of World War I when in 1918 it purchased from the United States Alien Property Custodian the capital stock of New York Bayer. New York Bayer prior to seizure by the Alien Property Custodian had been a wholly-owned subsidiary of German Bayer. Stipulation 4, 5, 7, 8, App. 61a-62a)

Through this purchase Sterling acquired control over the United States registrations to the trademarks "Bayer," "Bayer Cross" and "Aspirin." Since the operations of New York Bayer had been limited to North America, New York Bayer at the time of its acquisition by Sterling had no rights in Latin America. (Stipulation 4, 5, 7, 8, App. 61a, 62a). However, based on the United States registrations to these trademarks, Sterling was able to secure in a number of Latin Amer-

[a] Unlike the situation in the United States today where Aspirin is a generic term, it was and continues to be in many countries a valid trademark.

ican countries registrations to these and other trademarks which had been employed by German Bayer in Latin America. (App. 16a)

The General Joint Aspirin Business

On October 28, 1920, after a series of acts by Sterling which petitioner contends amounted to coercion, (Stipulation 11, App. 62a, Complaint para. 12, 13, App. 7a), German Bayer and Sterling concluded an agreement providing that the established valuable Latin American aspirin business of German Bayer should henceforth be conducted as a joint business. The text of the agreement is attached to the complaint as Exhibit A (App. 15a).

The stated purpose of the 1920 agreement was "to develop a large business in South and Central America and Mexico . . . for the purpose of exploiting acetylsalicylic acid (Aspirin) or its compounds in connection with the trade-mark aspirin, the trade name Bayer and the trademark referred to as the Bayer Crossmark or under any other trademark or name . . ." (App. 15a)

The parties jointly conducted a business in aspirin products in Latin America from 1920 until sometime in 1941. (Stipulation 16, App. 63a). The joint business, within the framework of the 1920 agreement, was organized as follows:

(a) As provided for in the agreement, the business utilized as its exclusive agencies in nearly all the larger Latin American countries, the established subsidiaries of German Bayer which prior thereto had acted as agencies of the aspirin business built up and operated by German Bayer. These subsidiaries of German

Bayer performed all functions necessary for the operation of the business on the local level. They imported the aspirin powder, tableted and packaged the aspirin and advertised and sold the finished product to the public. The services of these subsidiaries were supplied by German Bayer at cost (Stipulation 17, App. 63a).

(b) The business utilized the existing reputation and goodwill of German Bayer in Latin America by using the trademarks "Bayer," "Bayer Cross" and "Aspirin" which had previously been used by German Bayer on its aspirin, and continued to be used by German Bayer on all of its other pharmaceutical products sold in Latin America. For purposes of its aspirin business, German Bayer gave to New York Bayer a non-exclusive license to these trademarks.[3] (Paragraphs 2, 5 of Agreement, App. 15a, 16a).

c. The aspirin powder, which under the agreement was to be supplied at cost by the party able to do so at the lowest cost, was supplied by German Bayer at least during the period from 1920 to 1939. (Stipulation 18, App. 63a).

d. The local companies, which served as agencies of the joint business in the various Latin American countries, pursuant to the terms of the agreement, as far as the sale of Bayer aspirin was concerned, were under the immediate supervision, direction and control of Sterling. (Stipulation 17, App. 63a). The policy decisions, however, pursuant to which such control was exercised, were made at periodic meetings held between leading officials of the two companies. At these meet-

[3] Under the agreement Sterling reassigned to German Bayer those of the former German trademarks which Sterling had registered in Latin America since 1919 (Paragraph 5 of Agreement, App. 16a).

ings the major, and many relatively minor questions, relating to the business were discussed and joint decisions reached. (See Exhibits to Supplemental Affidavit of Werner J. Kronstein, App. 172a et seq.).

e. The joint business was a separate bookkeeping entity. The books of the business were kept by Sterling. Sterling, as bookkeeper of the business, arranged for the payment of all business expenses out of the proceeds of the joint business. Each year Sterling prepared an independently certified final statement of the profits from the sale of aspirin. In computing such profits it deducted all expenses permitted under the 1920 contract. (Stipulation 21, 64a).

f. Under the agreement 75% of the profits were due to petitioner and 25% to respondent. As the funds representing the profits were received from such various Latin American countries, 75% of the profits were paid to petitioner and 25% retained by defendant. The last payment of profits to petitioner was made in the summer of 1941. (Stipulation 22, App. 64a).

Separate Companies in Chile and Argentina

In addition to the joint aspirin business conducted within the framework of the 1920 agreement, which is here referred to as the "general joint aspirin business," petitioner and respondent also jointly held interests in two companies, one in Chile and the other in Argentina, both of which were engaged in the manufacture and sale of aspirin compounds.

(a) Laboratorios Hegemann—Chile

In 1937 German Bayer and Sterling acquired the busniess of Laboratories Recalcine, a Chilean company which sold an aspirin compound under the name "Ali-

viol." The "Aliviol" business acquired from Laboratorios Recalcine was transferred to a company called Laboratorios Hegemann y Cia., Ltda., which had been organized for that purpose. (Stipulation 27, App. 66a).

This business was acquired 75% for German Bayer's account and 25% for Sterling's account. However, the entire purchase price for this company was initially advanced by Sterling. Sterling agreed to:

> "*keep in trust for you* [German Bayer] *as property of your Company* the 75% share in Laboratorios Hegemann y Cia., Ltda., Santiago de Chile, until such time as the credit has been refunded." (Emphasis supplied) (Aff'dt. Exhibit A, App. 143a).[4]

(The Third Circuit apparently construed this transaction as a purchase by petitioner of 75% of the interest respondent had previously acquired in Hegemann. This construction is, in our view, inconsistent with the stipulated facts and with other evidence in the record, including the above quoted letter. This, however, is of no consequence to the legal issues presented here.)

Plaintiff, by August 1940, had repaid in full with 4% interest the amount which Sterling had advanced for its partner's 75% share of the purchase price. This payment was made as agreed by application to the debt of the profits of the "Aliviol" business and plaintiff's share of the profits under the 1920 contract in Chile. (Stipulation 29, App. 66a). Sterling, through nominees continued, however, to be record owner of plaintiff's interest in the Company and to be custodian of its shares even after the repayment of this debt. (Stipulation 28, App. 66a).

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[4] See also Stipulation 26, App. 66a.

(b) Laboratorios Suarry—Argentina

In 1937 and 1938 German Bayer and Sterling also acquired approximately 86% of the capital stock of Laboratorios Suarry S.A., a company selling an aspirin compound, "Geniol," in Argentina. The acquisition of this interest was made in two separate transactions.

In 1937 German Bayer and Sterling purchased 51% or 51,000 shares of the capital stock of Laboratorios Suarry. German Bayer acquired a 75% interest and Sterling a 25% interest in the shares. Sterling advanced the purchase price of German Bayer's 75% interest in these shares, this advance to be repaid out of German Bayer's share of the profits of the "Geniol" business and from its 75% share of its profits under the 1920 contract in Argentina. (Stipulation 31, App. 66a-67a). German Bayer agreed to pay 4% interest on the sums advanced. (Aff'dt. Exhibit B, App. 144a.) It was stipulated (Stipulation 34, App. 67a) that part but not all of the sums due were repaid when the contract was terminated but Sterling has refused to state the extent to which German Bayer was credited with repayment by 1941 or at any subsequent date.[5]

In 1938, the parties entered into an agreement with respect to the purchase of the Suarry shares in addition to the 51% already covered by the previous agreement. The terms of this agreement are set forth in a letter from German Bayer to Sterling dated April 19, 1938). (Stip. Exhibit D, App. 99a).

The entire 86% of the capital stock of Laboratorios Suarry in which either German Bayer or Sterling had

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[5] This amount is one of the items to be considered in the accounting prayed for by the complaint.

an interest were at all times voted at the direction of Sterling. (Stipulation 33, App. 67a). This was pursuant to a letter from petitioner to Sterling, dated November 9, 1938, by which German Bayer agreed that Sterling exercise on its "behalf all rights . . . and in particular voting rights . . . in respect of the [S] shares . . . acquired by us in so far and so long as the purchasing price expended by you for our account has not been repaid by us." (Aff'dt. Ex. C, App. 145a).

Termination of the Business Relationship

In 1941 a series of events occurred which lead to the termination of the business relationships between German Bayer and Sterling.

On August 14, 1941 Sterling sent plaintiff a telegram (Stipulation, Exhibit F, App. 105a) suggesting that because of present and proposed governmental restrictions the parties should "*terminate our joint Latin American business enterprises while conditions still permit our doing so on a negotiated basis,*" and containing a number of specific proposals to "*dissolve all contracts, agreements, understandings, partnerships and to divide jointly-held property and to terminate all obligations and rights resulting from the 1920 Latin American agreement.*" After a further exchange of telegrams, these proposals were rejected by German Bayer on August 27, 1941. There were no further negotiations between the parties until after the end of World War II. (Stipulation 36, and Exhibits F, G, H, I and J thereto. App. 68a, and 105a to 107a).

On September 5, 1941, the Department of Justice filed a complaint charging *inter alia,* that the 1920 agreement violated the antitrust laws of the United

States (Stipulation Exhibit M, App. 113a). On the same day Sterling entered into a consent decree which enjoined it from further performance of the provisions of the 1920 agreement. (Stipulation, Exhibit N, App. 121a). German Bayer was not a party to the proceedings in which the consent decree was entered nor to the decree itself.

Demand for Accounting

After World War II petitioner, determining that its property rights although subject to seizure, had not in fact been vested by the Alien Property Custodian, demanded an accounting for its interests in the general joint aspirin business and in Laboratorios Hegemann and Laboratorios Suarry. After negotiations, Sterling in May and June, 1955, advised German Bayer that it would not render any accounting for these property interests. (Plaintiff's Memorandum in Opposition to Motion Under Rules 12 and 56. Exhibits A, B, App. 58a(1). Accordingly, in September, 1955, petitioner filed the present complaint (App. 5a *et seq.*).

At no time did petitioner demand a resumption of joint business relationships. It desires to make a final termination of such business relationships, and accordingly asks only for an accounting of its property interests held by Sterling.

Relief Requested

Petitioner in its complaint seeks an accounting for the property rights in the joint business enterprise which had existed up until 1941.

The substance of the petitioner's claims are stated in the second and fourth causes of action. In the second cause of action, petitioner seeks an accounting for its

75% interest in the general joint aspirin business. In the fourth cause of action petitioner demands an accounting for its 75% interest in Laboratorios Hegemann and Laboratorios Suarry. The first cause of action is a partial particularization of the claim made in the second and fourth causes of action for funds held by Sterling as part of petitioner's interest in the businesses covered by the two causes of action.[6]

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[6] The Court of Appeals' summary of petitioner's second cause of action may be somewhat ambiguous. The opinion states that petitioner in its second cause of action seeks an accounting for

> "its rights in the aspirin business that defendant has been conducting in Latin America *after the agreements were declared illegal* [in 1941]."

It is perfectly clear from all papers filed below that petitioner claims a right to an accounting for its interest in the joint aspirin business conducted *prior to* 1941 and for its value as a going business in 1941. As petitioner stated on page 72 of its principal brief filed with the Court of Appeals

> "The question whether defendant must account for the aspirin business which it has conducted since 1941 depends, of course, upon the extent to which it has continued the business formerly conducted by the joint venture, whether it has started a new business and whether it has invested any of the resources of the joint venture in such a new business. If it is established in the accounting that defendant has substantially continued the same business then Sterling will have to account for the aspirin business conducted by it in Latin America since 1941, except during the period of the hostilities in World War II which is waived by paragraph 29 of the complaint (App. 12a). If, on the contrary, in the accounting Sterling is able to establish that it set up an entirely new business and has not used the good will, property, experience and personnel of the joint business, then of course the accounting will cease as of 1941."

The third cause of action is stated in the alternative as a claim for breach of contract in the event relief is denied on Count II. The third cause of action was not pressed in the courts below.

Restraint on Competition

The 1920 agreement contained a provision (paragraph 11, App. 18a) which bound both the American and German firms not to offer or market aspirin independently in competition with the joint business.

The provision in *toto* reads as follows (App. 18a):

> "11. New York and Leverkusen agree not to offer or market independently directly or indirectly Acetylsalicylic Acid or its compounds in the countries coming within this agreement except upon the terms and subject to the conditions of the agreement."

It was assumed in argument below by petitioner that this provision of the 1920 agreement was unenforceable as a restraint of competition under the Sherman Act insofar as it purported to prevent Sterling from competing with the joint business.[7] Petitioner urged that it was not trying to enforce this provision of the agreement but only to obtain an accounting of its property rights on the dissolution of the joint venture. Respondent argued that the provision quoted rendered the entire agreement "illegal" and that "therefore" petitioner could not complain if its property rights with respect to the Latin American business had been appropriated by Sterling.

Prior Proceedings

The District Court first dismissed the case on grounds that petitioner had no right to access to American

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[7] The non-competitive provision of course did not violate the antitrust laws insofar as it prevented the German firm from competing, since the foreign commerce of the United States would not be restrained by the failure of the German firm to compete in the Latin American market.

courts to enforce a claim to property which had been subject to seizure by the Alien Property Custodian during World War II even though it had not actually been seized. (148 F. Supp. 733) This dismissal was reversed by the Third Circuit. (251 F.2d 300). Upon remand respondent, on June 30, 1958, filed a Motion for Summary Judgment (App. 59a). The motion raised various issues including the defense of illegality, or *in pari delicto*, as well as statute of limitations and laches. This motion was held in abeyance by the District Court pending pretrial proceedings which resulted in a detailed stipulation of fact entered in September 1959 (App. 60a *et seq.*). Petitioner thereupon, on October 29, 1959, filed a cross-motion for summary judgment to establish its right to an accounting for its interest in the joint Latin American businesses (App. 139a).

The District Court granted respondent's Motion for Summary Judgment, 197 F. Supp. 613, holding *inter alia:*

1. That petitioner was not entitled to an accounting for its interests in the joint Latin American businesses, because its claim for an accounting was premised on the 1920 contract which contained a restraint on competition in violation of the antitrust laws of the United States.

2. That petitioner's claims were barred by the statute of limitations and laches.

On appeal the United States Court of Appeals for the Third Circuit, 307 F.2d 207, affirmed the judgment of the District Court dismissing the complaint, but did so on the sole ground that the relief could not be granted because petitioner's claims arose out of a contract violating the antitrust laws.

Basis For the Decision Below

The Court of Appeals held that the 1920 agreement was illegal because the "covenant not to compete" with the joint business "permeated and tainted the agreements." Footnote 1, 307 F.2d at 208.

The Court held that petitioner could not recover "the profits derived from the business conducted under the illegal agreements." Id. at 209. It regarded the Hegemann and Suarry share interests as obtained under illegal agreements because plaintiff's interest was paid for out of the profits arising from the 1920 agreement.[8]

A Petition for Rehearing was filed, but was denied by the Court of Appeals on September 11, 1962.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important question of the application of the antitrust laws to international trade. The decision below holds that an American partner to a joint Latin American business may appropriate its foreign partner's property where the business, otherwise legal, is conducted under an agreement in which the partners agree not to compete with the joint business.

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[8] In addition, the Court indicated that there was no joint venture because it found no provision in the 1920 agreement for joint control of the general joint aspirin business venture (although the record is clear that joint control was in fact exercised). It, however, found this immaterial, saying that even if there were a joint venture, recovery could not be had because what was sought were profits derived from the 1920 agreement. The Court also held that the fact that petitioner was unaware that the covenant violated the antitrust laws was no defense. Footnote 1, 307 F.2d at 208. The Court did not deal with the issue of coercion by Sterling to compel Bayer to enter into the agreement which had been reserved for trial.

The decision below is a direct violation of the rule of law laid down by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516.

The decision also represents a dangerous precedent in that it exposes foreign partners in long term international dealings with American firms, and American partners in similar dealings with foreign firms to the risk of having their property appropriated by their partners. Under the Third Circuit's ruling an American firm, by invoking the defense of illegality, is permitted to enrich itself at the expense of its European partners even if, only many years after the conclusion of an agreement between them, it becomes apparent, through subsequent judicial and administrative interpretations of the antitrust laws, that the continued participation of the American partner in the agreement is violative of these laws. This ruling casts a cloud of insecurity over property interests entrusted or arising out of every agreement between major American and foreign firms, as no such agreement can be entirely free of possible antitrust implications.

Nor can American firms be secure that they will not suffer similar consequences. New antitrust statutes have recently been adopted by other important industrial countries, *e.g.*, the European Economic Community and the Federal Republic of Germany.[9] These laws are similar to the American laws in that they pro-

[9] Treaty of Rome, §§ 85 *et seq.*, effective January 1, 1958, and German Law Against Restraints of Competition of July 27, 1957, 1 Bundesgesetzblatt 1081. The text of these laws and those of other countries are reprinted in "Organization for European Economic Co-operation," (OEEC), Guide to Legislation on Restrictive Business Practices (1960).

vide that broad categories in agreements of restraint of trade "null and void." These laws are as yet uncertain in their application. At a subsequent time, the conduct of some American firms under these laws will no doubt be held to be illegal. If the ruling below is not reversed, it may well be adopted as a precedent by foreign courts to subject such American firms to expropriation of their properties by their European partners.

The decision below is thus not only an erroneous application of the rule of law laid down by this Court, but a menacing precedent both for American and foreign firms in their joint operations in a world market which is becoming increasingly subject to laws against restraint of competition, not only by this country, but by many other nations of the world.

The decision below makes the antitrust laws not merely a charter of economic freedom, but a device for unjust enrichment at the expense of the business partners.

I. The Decision Below Is In Plain Conflict With This Court's Ruling in Kelly v. Kosuga

The decision below is a departure from the consistent line of decisions of this Court, the most recent of which is *Kelly* v. *Kosuga*, 358 U.S. 516, which hold that the defense of illegality, or *in pari delicto*, is narrowly restricted, where Sherman Act violations are involved, to "where the judgment of the Court itself would be enforcing the precise conduct made unlawful by the Act." Except in this limited situation, it is explicit in this Court's rulings that the policy that one party should not be permitted to enrich itself unjustly by taking the property of another but not paying for it is "over-riding".

This is the theme which runs through all the decisions of the Court involving this defense which "has not met with much favor in this Court," *Kelly* v. *Kosuga*, 358 U.S. at 518. In *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 755 (1947), this Court, for example, in summarizing its previous holdings on this question, defined this defense as one entertained where a suit "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought." There is only a single case in which this Court has sustained the defense of illegality, and that was *Continental Wall Paper Company* v. *Louis Voight & Sons*, 212 U.S. 277 (1909), and there only because the effect of a judgment for the plaintiff would have been, as this Court stated in *Kelly*, "to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." See also *Pullman's Palace Car Co.* v. *Central Trans. Co.*, 171 U.S. 138; *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U.S. 165 and *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457.

Petitioner in this case is asking for an accounting for property which respondent retained in a fiduciary capacity for petitioner after the agreement within whose framework the joint businesses were conducted was terminated in 1941. Such a judgment of accounting and payment of funds found to be due thereon plainly could not "enforce the precise conduct made illegal by the Act" nor could it "make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." The illegal restraint contained in the 1920 agreement was the promise of Sterling not to compete with the joint business undertaking in Latin America. This restraint, not in effect since the termination of the agreement in 1941, cannot possibly be

revived, enforced, or effectuated in any way by granting relief to petitioner in this action. The decisions of this Court permitting the defense of illegality may be entertained only where a judgment for petitioner would have such results required the Third Circuit to strike the defense.

The Third Circuit's contrary action denying relief, on the ground that "recovery does not depend on a collateral obligation," but on the contract itself, is premised on a failure to recognize one of the essential points in this Court's holding in *Kelly*. For *Kelly* holds that illegality is "collateral" and not "inherent" if the promise sued on can be enforced without also enforcing "the precise conduct made unlawful by the Act."

The illegality here is plainly "collateral" to the promise sought to be enforced. What was "illegal" under the 1920 agreement was the promise of Sterling not to compete with the joint business and to make all its sales of aspirin in Latin America a part of the joint business. This promise is plainly not enforced by requiring Sterling to account for petitioner's property interests which existed in the joint businesses prior and up until 1941 when the agreement was terminated. Petitioner does not ask for any share of the profits from the business conducted by Sterling after the agreement was declared illegal in 1941, except insofar as an accounting might show that Sterling used what belonged to German Bayer.[10]

[10] For a more detailed discussion on the relief which petitioner seeks in this action, see "Relief Requested," *supra*, p. 12.

Under this Court's decision in *Kelly*, it is plain that the fact that an agreement contains a provision in violation of the antitrust laws does not make the entire contract "inherently" illegal, even though the illegal provision is not strictly "divisible" from the remainder of the contract.

In Kelly, there was a single contract containing (1) a promise to buy and pay for onions, and (2) a promise by both parties, in violation of the Sherman Act, not to sell any onions on the future markets for the purpose of maintaining an artificial price for onions. This Court held that while the later restrictive agreement could not be enforced by the Court, as this would enforce "the precise conduct" forbidden by the Act, the sales agreement represented an "intelligible economic transaction of itself," which could and should be enforced to prevent the unjust enrichment of the respondent. The Court deemed it not to be "inappropriate or violative of the interest of the parties" to give effect to the purchase agreement "even though it furnished the occasion for a restrictive agreement . . ."

In this respect this case is strikingly similar to *Kelly*. Here there is also a contract containing:

1. Provisions for the establishment and operation of a joint aspirin business in Latin America.

2. An agreement entered into at the "occasion" of the establishment of this joint business pursuant to which the parties agreed not to compete with this joint business in Latin America. As in *Kelly*, the latter promise could not be enforced because to do so would enforce a violation of the antitrust laws. However, as in *Kelly*, the principal part of the agreement plainly

represents an "intelligible economic transaction in itself."[11]

The Third Circuit, in its decision, also seems to have been led astray by its categorization of the relief petitioner is seeking as "profits arising directly from operations conducted by defendant and itself under the illegal agreements." The Third Circuit seems to have equated recovery of *profits* with a judgment which "enforce(s) the precise conduct made unlawful by the Act." This approach, however, is contrary to the decisions of this Court. It may well be that where the sole or principal basis for a profit sharing arrangement is the promise by one party not to compete with the other in a certain geographical area that the defense of illegality will be entertained. But the situation is entirely different where the basis for the profit sharing arrangement is a joint business undertaking which plainly represents "intelligible economic transaction" in itself.

The basis for the money payment which petitioner is seeking to recover in this action represents the value of petitioner's share in the joint aspirin businesses conducted by the parties in Latin America, and the return from the contributions which it has made to that business. These contributions included the goodwill of its Latin American aspirin business

[11] Indeed, we submit that the restrictive agreement in this case probably represented a less significant part of the entire bargain as did the restrictive provision in *Kelly*. When two parties enter into a joint undertaking of the kind established by the 1920 contract, it may generally be assumed the parties in their own interest will not compete with their joint endeavor. An agreement to buy and sell, however, does not imply or assume in any way that the parties thereto will not sell more of any of the same commodity on the market.

antedating the 1920 agreement, licenses to trademarks, the services of its established dealer organization supplied at cost and its aspirin products supplied at cost. The share of the profits to which plaintiff is entitled is in effect a payment for its contribution to and share in the joint business undertaking. The payment sought is not in any part a payment for the promise not to compete (this aside from the fact that the German firm was free, under its own then existing law and American law as well, to promise not to compete in Latin America). *The only vice under American law was in Sterling's promise not to compete with the joint business and that promise is neither sought to be enforced nor compensated by the present claim.*

The scope of the decision of the Third Circuit denying relief on the grounds that petitioner is seeking to recover "profits" arising, out of an illegal agreement, and what this means in terms of unjust enrichment is best exemplified by the case of Laboratorios Hegemann. This company was jointly purchased by petitioner and respondent in 1937. It was agreed that petitioner was to have a 75% share and respondent a 25% share in this company. Respondent advanced the money required for the purchase of petitioner's 75% share in this company, and agreed "*to keep in trust for you (petitioner) as property of your Company the 75% share in Laboratorios Hegemann y Cia., Ltda, Santiago de Chile, until such time as the credit has been refunded.*" (Afdvt. Exhibit A, App. 143a) Pursuant to this agreement between the parties, this debt had been repaid in full by August 1940 out of petitioner's 75% share in the profits of Laboratorios Hegemann, as well as from its 75% share of the profits of the general aspirin business in Chile. Since respondent continued as the record

owner of petitioner's interest in this company even after the debt had been repaid, in 1941 it was able to appropriate the entire business operated by Laboratorios Hegemann, a company in which petitioner owned 75% of the shares, by transferring its assets to another company in which respondent did not recognize any interest of petitioner. Stipulation 26-29, 47 App. 66a, 70a) This was a bald appropriation of property which respondent held as trustee.

The Court of Appeals, however, denied petitioner relief for the reason that the money which respondent had advanced for the acquisition of petitioner's interest in this company was repaid "out of the profits" of the 1920 agreement, as well as out of the profits of Laboratorios Hegemann.[12]

The practical result of the Court of Appeal's decision is to permit Sterling unjustly to enrich itself at the expense of petitioner by increasing its share in Hegemann from 25% to 100% without paying for it. Such a result in a case where a decree compelling the fiduciary to account would require a simple money payment which could not be regarded in any way as "enforcing" any illegal conduct cannot be squared with this Court's decision in *Kelly*. The decision below should be reviewed by this Court.

II. The Decision Below Establishes a Dangerous Precedent Affecting the Security of Property Rights In International Trade

The decision of the Court of Appeals adversely affects the present and future security of property rights in many long term commercial relationships where one of the partners is an American firm.

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[12] The Court of Appeals regarded the Hegemann profits as due to petitioner under the 1920 agreement.

Long time joint undertakings, similar to the business relationships in question in this case, are extremely common, and in many forms are not regarded to be in violation of the antitrust laws. Indeed, cooperation between foreign and American firms, particularly in under-developed countries, are important and desirable methods of cooperation between business enterprises, each contributing some of the elements necessary for the success of such a venture.[13]

A. It will be clear that any such form of cooperation, in particular where the parties are large business enterprises, can not be entirely free from antitrust implications. All the parties can do to assure compliance with the antitrust laws is to organize their business consistent with the judicial precedents and with the current views of antitrust experts. The partners to a long term agreement can not know how the interpretation and practice under the antitrust laws will evolve

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[13] The Honorable Teodoro Moscoso, United States Coordinator of the Alliance For Progress, stated in a speech before the Institute For International and Foreign Trade Law, Washington, D. C., April 10, 1962

> "I suggest to you that perhaps there is a real opportunity for creative and imaginative use of joint ventures and joint enterprises, mixing broad foreign equity participation, management techniques and technology with local resources.
>
> Such 'mixed' business organizations have many advantages *To the extent that they include participation by both European and North American firms they can draw on the wealth of experience and resources of all the developed free nations.* At the same time, such 'mixed' ventures can serve to develop expanded trade relations between Europe and Latin America, and perhaps also help to convince Europe of its vital interest in increased aid to the area, within the context of the Alliance and consistent with its goals." (Emphasis supplied).

in the future. Under the decision of the Third Circuit, however, their failure to predict correctly the development of antitrust laws may result in the appropriation of a company's property by its American partner.

The contract in question in this case was concluded in 1920. This was the time when the application and interpretation of the antitrust laws, especially in the field on international restraints of competition, was in a most rudimentary state. When the 1920 agreement was concluded, there was not a single decision holding that an agreement between an American and a foreign firm not to compete with a joint business enterprise conducted by the companies in a third country was an unreasonable restraint of competition in violation of Section 1 of the Sherman Act.[14] Nor in 1920 was there any other basis for concluding that such an agreement was or would be held to be in violation of the law. Indeed, it was not until 1951, ten years after this contract terminated, that a court held for the first time that such an arrangement constituted a violation of the Sherman Act. See *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 557 (S.D.N.Y. 1951).[15]

Petitioner, in the Court of Appeals, argued that under these circumstances the defense of illegality or *in pari delicto* may not be entertained, because the doctrine of *in pari delicto* pre-supposes equal fault or

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[14] Indeed, as late as 1936, this Court cited *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, with approval. See *United States* v. *Curtis-Wright Export Corporation*, 299 U.S. 304, 318.

[15] Sterling itself claimed (Appendix for Appellee, 28b) and it is not disputed that the first intimation it received of any question of the legality of the agreement was in 1941 when the Department of Justice began an inquiry. It did not advise petitioner of this question.

delicto on the part of the parties, and where, as here, the illegality of the conduct becomes apparent only as later development and interpretation of the antitrust laws, it was not possible to speak in terms of fault at all.

The Court of Appeals, in its decision, disposed of this issue by citing *Reynolds Metal Co.* v. *Metal Disintegrating Co.*, 8 F.R.D. 349 (D. N.J., 1948) Aff'd. 176 F.2d 90 (C.A. 3, 1949), wherein it is stated that "ignorance of the law . . . is no excuse." The application of this truism however, is plainly inappropriate in a case of this kind.

The antitrust laws, as will be recognized, do not spell out in detail, as criminal statutes generally must do, the precise acts which constitute a violation. The antitrust laws, and in particular Section 1 of the Sherman Act which is involved here, resemble more closely a constitution of economic competition. What comes within the prohibition of Section 1 of the Sherman Act has evolved continually and greatly since its enactment in 1890 through both the enforcement policies of the Justice Department and judicial construction. A person therefore may realistically only be chargeable with knowledge of the antitrust laws as interpreted today, and plainly can not be charged with knowledge of their future development, and that at the risk of forfeiting his property.

Of course, it is no defense to a government suit that the agreement was not recognized as illegal under the antitrust laws at the time it was concluded. Otherwise, by entering into a long term agreement, parties could assure themselves against government intervention under the Sherman Act. Nor is it possible to avoid new constructions of the law in private litigation in order

to insist on continued performance of agreements illegal by current standards.

An entirely different situation is presented, however, when one of the parties to an agreement which, as a result of a subsequent development of the antitrust laws becomes to be recognized as illegal, attempts to benefit therefrom by unjustly enriching itself at the expense of the other party by appropriating its property.

The court below permitted such appropriation of property even though, on summary judgment, it had to assume the allegations of complaint that petitioner entered into the 1920 agreement as the result of economic coercion exercised by respondent. (Complaint para. 13, 14, App. 7a; Stipulation 11, App. 62a.) In *Ring* v. *Spina*, 148 F. 2d 647 (2nd Cir. 1945) it was held that where one of the parties is a victim of economic coercion exercised by the other, the parties are not in *pari delicti*, and the defense of illegality does not apply.

If such consequences are to be attached to new developments in the law of antitrust, it should only be after the considered judgment of this Court.

B. The approach of the Third Circuit seems to be particularly inappropriate in light of the fact that the illegality of the 1920 agreement stems only from the fact that Sterling as an American firm could not, under the Sherman Act, agree not to compete with the joint aspirin business in Latin America. If petitioner had concluded this agreement with another foreign firm, it would have been legal and binding. The fact that Sterling's participation in the agreement violated American law may free it from its obligation to perform there-

under. It would be an analomous result, however, if Sterling, in addition to stepping out of the agreement, also could appropriate the property of its business partner. Surely such a rule cannot be fairly applied where both the business partner is incorporated in, and the business activities covered by the agreement "are conducted in areas of the world where different standards of industrial behavior prevail than are accepted in this country." *U.S.* v. *General Electric,* 115 F. Supp. 835, 852 (D.N.J., 1953).

C. The disturbing implications of the Third Circuit's decision can be most acutely felt if we consider that agreements to which American companies are partners may and probably will be found illegal under the new and still uncharted antitrust laws of the European Economic Community, as well as under the recently adopted antitrust laws of certain European countries. These antitrust laws are still in their rudimentary state, much as the American antitrust laws were in 1920, in particular, as applied to international restraints of trade. The antitrust laws of the European Economic Community, for example, forbid in fairly general terms agreements which have "the object or effect of preventing, restraining or distorting" competition and makes agreements of this kind "null and void." (Article 85 of the Treaty Establishing the European Economic Community, effective January 1, 1957. Cf Section 1 of the German Law Against Restraint of Competition, note 9, p. 17, *supra.* These provisions have not been authoritatively construed, and necessarily there are many questions as to their scope and meaning. It is impossible to anticipate with any degree of accuracy, therefore, how this and similar provisions will be inter-

preted, and to what type of arrangements they will be applied.

It would be grossly unfair if at some future date it should become evident that an agreement between a European and American company, now considered legal, violates the antitrust laws of the European Economic Community for the European company to be able to appropriate for itself the property which arose in connection with, or was transferred, under such an agreement. Under the ruling of the Third Circuit, however, the American company would be in a weak position to object to such a procedure as this would be equivalent to the treatment European companies receive in the United States.

The decision below is a dangerous precedent for American foreign trade as well as a direct violation of this Court's opinion in *Kelly* v. *Kosuga*. It requires review by this Court.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

THURMAN ARNOLD
MILTON V. FREEMAN
EDGAR H. BRENNER
WERNER J. KRONSTEIN

ARNOLD, FORTAS & PORTER
1229 19th Stret, N.W.
Washington 6, D. C.

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,806

FARBENFABRIKEN BAYER A.G.,
Appellant,

v.

STERLING DRUG, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 7, 1962

Before McLAUGHLIN, STALEY and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 9, 1962)

By STALEY, *Circuit Judge.*

Plaintiff, Farbenfabriken Bayer A.G., like defendant, Sterling Drug, Inc., is engaged in the manufacture and distribution of drugs and pharmaceutical products. In 1918, after the United States entered the war against Germany, the capital stock of The Bayer Company, Inc. ("Bayer") a wholly owned subsidiary of plaintiff's predecessor, Farbenfabriken vorm. Freidrich Bayer and Company ("Farbenfabriken"), was sold to defendant by the Alien Property Custodian, whereupon Bayer became a wholly owned subsidiary of defendant.

In 1920, after the war, Farbenfabriken and Bayer executed a contract which granted Bayer the exclusive license to use certain trademarks in selling aspirin in various Latin American countries; Farbenfabriken promised to ship and deliver aspirin and aspirin products to Bayer only, and the parties agreed to endeavor to prevent the importation into Latin America of all aspirin and aspirin products bearing the trademarks covered by the agreement. In 1923, Bayer and Farbenfabriken entered into another agreement effecting a world-wide division of the drug and pharmaceutical market between them. Until 1939, Bayer acted as the Latin American distributor for aspirin manufactured by Farbenfabriken. Thereafter, defendant acted as both the manufacturer and distributor. Continuously until the summer of 1941, Farbenfabriken received 75 per cent of the profits arising from Latin American sales, while Bayer retained 25 per cent. In 1937, defendant purchased the "Aliviol" business of Laboratorios Recalcine, a Chilean company, and a majority of the stock of Laboratorios Suarry, S.A., an Argentinian company.

In 1941, the United States District Court for the Southern District of New York declared the 1920 and 1923 agreements illegal under the antitrust laws of the United States and enjoined Bayer from further performance of any of their provisions. Thereafter, Bayer discontinued the sale of aspirin in Latin American countries. The "Aliviol" business, which in the meantime had been transferred to Laboratorios Hegemann y Cia, Ltda., and Laboratorios Suarry, S.A., were conveyed in 1941 to new companies wholly owned or controlled by defendant, and in January of 1942 aspirin products were made available in Latin America under new trademarks registered by defendant.

Plaintiff commenced this action for an accounting of profits, its rights in the aspirin business that defendant had been conducting in Latin America after the agreements were declared illegal, as well as its interests in the Hegemann and Suarry companies. The defendant contends that all of plaintiff's claims arise out of contracts violative of the

antitrust laws. It urges that to grant such relief would be against public policy. The district court agreed with defendant and entered summary judgment in its favor.[1]

The controlling rule of law was clearly spelled out by the Supreme Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909). There, plaintiff brought an action to recover the unpaid purchase price of merchandise sold and delivered to defendant under an agreement that violated the antitrust laws. In affirming judgment for defendant, the Court said.

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." 212 U.S. at 261 (Emphasis in original.)

In accord with that proposition is Central Transportation Co. v. Pullman's Palace Car Co., 139 U.S. 24 (1891), and its application to varying fact situations can be found in Tampa Electric Co. v. Nashville Coal Co., 276 F.2d 766 (C.A.6, 1960), reversed on other grounds, 365 U.S. 320 (1961); Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29 (C.A.7, 1959); United States v. Bayer Co., 135 F. Supp. 65 (S.D.N.Y., 1955); Ful-Vue Sales Co. v. American Optical Co., 118 F. Supp. 517 (S.D.N.Y., 1953).

[1] Any claim by plaintiff that it was unaware that the covenant not to compete, which permeated and tainted the agreements, violated the antitrust laws, and that it should, therefore, be allowed to recover, fails in light of Reynolds Metals Co. v. Metals Disintegrating Co., 8 F.R.D. 349 (D.N.J. 1948), aff'd, 176 F.2d 90 (C.A.3, 1949).

And the same rule has been applied to contracts not involving a violation of the antitrust laws. E.g., Bromberg v. Moul, 275 F.2d 574 (C.A.2, 1960) (OPS regulation); Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co., 139 Fed. 780 (W.D.Pa. 1905) (contract for collusive bidding). However, where recovery is sought based on an obligation collateral to but independent of the illegal agreement, and the court, in allowing recovery, need not look to and enforce the terms of the illegal agreement, illegality is no bar. Kelly v. Kosuga, 358 U.S. 516 (1959); Bruce's Juices v. American Can Co., 330 U.S. 743 (1947); D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902); Pullman's Palace Car Co. v. Central Transportation Co., 171 U.S. 138 (1898); Morand Bros. Beverage Co. v. National Distillers & Chemical Corp., 25 F.R.D. 27 (N.D.Ill., 1959). A review of the facts in the most recent of these decisions, *Kelly*, brings the rule sharply home. Plaintiff there commenced an action to recover the purchase price of fifty cars of onions. Defendant interposed the defense that the sale was made pursuant to an indivisible agreement violative of the antitrust laws. The Supreme Court, in affirming the action of the district court that struck the defense, indicated that the sale itself was a lawful one, for fair consideration, and it was not necessary to look to or enforce the terms of the illegal agreement.

Plaintiff here argues that granting the relief it seeks would not violate the principle of *Continental*, for in awarding it the lump sum payment it seeks, the court would not be enforcing the provisions of the illegal agreement, nor does it seeks to have the defendant continue to perform that agreement in the future.

The 1920 agreement provided that plaintiff was to receive 75 per cent of the profits arising out of the sale of aspirin in Latin America. Bayer was to retain the remaining 25 per cent, and the agreement was to last for fifty years. Bayer and Farbenfabriken further agreed not to

offer or market independently aspirin or its compounds under any trademark or trade name in any of the Latin American countries. Under the agreement, the books of Farbenfabriken and Bayer were to be made up at the end of the calendar year, and any profits due were to be paid within ninety days after the amount had been certified and approved by the parties. It further provided that products delivered by Farbenfabriken for sale in the Latin American market were to be paid for by Bayer at the pro forma cost price of such products ninety days after delivery. The agreement also covered other products sold by Bayer under the Bayer or any other registered trademark owned by Farbenfabriken.[2]

In 1937, Farbenfabriken and defendant agreed that the latter would purchase and pay for the "Aliviol" business of Laboratorios Recalcine and a majority of the stock of Laboratorios Suarry. It was agreed that Farbenfabriken would purchase seventy-five per cent of the interest of defendant in the two companies after they were acquired by defendant.

Plaintiff's complaint makes it perfectly clear that what it seeks are the profits derived from the business conducted under the illegal agreements. It sets out four causes of action. The first one refers to the 1920 agreement as the basis for the claim, and prays:

> "Wherefore, plaintiff prays for an accounting of the profits of the joint Latin American business under the 1920 contract for the years 1940 and 1941 and payment to it of the amounts so allowed, and for such other and further relief as to the Court seems just."

In its second cause of action, plaintiff seeks an accounting of its interest in the aspirin business conducted in Latin America by defendant after the agreements were declared illegal. It contends that the agreements resulted in a joint

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[2] Farbenfabriken has not alleged that it was not paid for goods and services delivered or performed by it under the agreements.

venture in which it had a proprietary interest. From this it argues that by granting an accounting the court need not enforce any of the provisions of the agreements, but merely enforce its rights as a party to a joint venture. The district court, however, correctly found that the 1920 agreement did not give rise to a joint venture. It fails to provide for joint control in or a continuing right to management of the Latin American business, an indispensable element of a joint venture. Assuming arguendo that a joint venture was created, we think it immaterial, for what plaintiff actually is seeking is an accounting of the profits arising out of the 1920 agreement.

Plaintiff's third cause of action was an alternative claim for damages for a breach of the 1920 agreement. It did not press that cause of action in the district court, nor does it do so here.

In the fourth cause of action, plaintiff again invoked the provisions of the 1920 agreement and sought an accounting from defendant with respect to Hegemann and Suarry. Plaintiff stipulated in the district court, however, that its interest in the two was to be paid for *solely out of profits* resulting from the sale of aspirin under the 1920 agreement in certain enumerated Latin American countries.

Thus it is abundantly clear that what plaintiff is attempting to recover are profits arising directly from operations conducted by defendant and itself under the illegal agreements: one wrongdoer seeking the aid of the court to compel the other wrongdoer to disgorge its share of the spoils. Under the circumstances, to grant that relief the court not only would be required to look to but to enforce the illegal agreements, for here recovery does not depend on a collateral obligation or on one that arises independently as was true in Kelly, Bruce's Juices, Wilder, and Connolly, *supra*. In this situation, what the Supreme Court said in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. at 262, is apposite:

"• • • We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, *to a party seeking to realize the fruits of an agreement* that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." (Emphasis supplied.)

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

FARBENFABRIKEN BAYER, A. G.
a corporation, *Plaintiff*,

v.

STERLING DRUG INC., a corporation,
Defendant.

Civ. A. No. 909-55.

United States District Court
D. New Jersey.
July 21, 1961.

WILLIAM F. SMITH, Chief Judge.

This is a civil action in which the plaintiff, a corporation organized under the laws of Germany, asserts four separate but related claims, to wit, first, a claim for profits allegedly due for the years of 1940 and 1941 under a contract; second, a claim to property and funds allegedly appropriated by the defendant; third, and in the alternative, a claim for damages for breach of contract; and fourth, a legal and equitable claim based upon a breach of trust. The action is essentially one to compel an accounting.

The action came before the Court on a motion for the entry of judgment filed by the defendant under Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The hearing on this motion was held in abeyance pending the conclusion of a pretrial conference held by the Court under Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A. The conference resulted in a comprehensive stipulation of facts and an agreement on the relevancy and materiality of eighteen written exhibits. Thereafter the plaintiff filed a counter-motion for summary judgment.

These motions have been argued and are now before the Court for decision. The motions are based on the entire record, which includes the pleadings, stipulation, exhibits,

and affidavits. The defendant has urged numerous grounds in support of its motion but it is here necessary to consider only the principal ones. It is our opinion that the ground considered may be dispositive of the litigation.

Parties

The plaintiff, Farbenfabriken Bayer A. G., hereinafter identified as Farben, is engaged in the development, manufacture and sale of drugs and pharmaceutical products. The plaintiff alleges that it is the lawful successor to Farbenfabriken vorm. Friedrich Bayer and Company, hereinafter identified as Leverkusen. This allegation is denied by the defendant, but for the purpose of the present motions we shall accept it as true. It should be noted that the immdeiate successor to Leverkusen was I. G. Farbenindustrie, hereinafter identified as I. G. Farben, which succeeded to the business of Leverkusen in 1925.

The defendant Sterling Drug, Inc., hereinafter identified as Sterling, a corporation of the State of Delaware, is engaged in the development, manufacture and sale of drugs and pharmaceutical products. It is the lawful successor to Sterling Products, Incorporated, and the Bayer Company, Inc., a New York corporation, hereinafter identified as Bayer. These corporations were merged on December 31, 1942.

Facts

I

The predecessor of the plaintiff, Leverkusen, in 1894, organized a wholly-owned United States subsidiary, Farbenfabriken of Elberfeld Company, under the laws of New York. This subsidiary, in 1908, was granted registration of the United States trade-marks, to wit, the name "Bayer" and the "Bayer Cross," disposed within a circle. The said predecessor, in 1913, organized two corporations under the laws of the State of New York, to wit, Synthetic Patents Company, Inc., and Bayer. The subsidiary, Farbenfabriken of Elberfeld Company, was thereafter dissolved, and

some of its assets, including the said trade-marks, were transferred to Bayer. The use of the trade-marks by the subsidiary, and later Bayer, was exclusive between 1895 and 1917.

II

The capital stock of Bayer and of Synthetic Patents Company, Inc., and other assets of Leverkusen, were vested by the Alien Property Custodian on January 15, 1918, after the declaration of war on Germany. The vested assets were sold to the defendant's predecessor at public auction in December 1918, pursuant to the applicable provisions of the Trading with the Enemy Act, and Bayer became the wholly-owned subsidiary of the said predecessor. As hereinabove noted these corporations were merged on December 31, 1942.

III

After a period of negotiations which extended from August 1919 to October 1920, Leverkusen and Bayer entered into a contract under which the latter acquired the exclusive license to use the trade-marks in connection with the sale and distribution of acetylsalicylic acid (aspirin), and its compounds, in several Latin American countries. This contract contained, in addition to the usual terms and conditions of a license agreement, provisions which governed the sale and distribution of aspirin and aspirin products in the territory.

IV

Bayer agreed, as part of the consideration, to transfer to Leverkusen those trade-marks registered in the name of Bayer in the Latin American countries, and which, before such registration, had been employed by Leverkusen to designate its products in the same territory. Bayer further agreed to withdraw all pending applications for such trade-marks.

V

Leverkusen agreed not to issue any license for the use of the trade-marks to any other person or corporation. It further agreed: first to ship and deliver aspirin and aspirin products only to Bayer; and, second, not to supply to any other person or corporation aspirin or aspirin products for sale in the territory under the trade-marks. The parties agreed "to use their best endeavors to prevent all importation of" aspirin and aspirin products bearing the trade-marks.

VI

The contract provided that the business and distribution of aspirin and aspirin products was to be conducted solely by Bayer, through agencies appointed or to be appointed by it, except where existing agencies of Leverkusen were in active operation; in such case the latter agencies were to be utilized. There is a further proviso not relevant here. The subsidiary agencies of Leverkusen were utilized in the larger countries, except in Argentina, until 1941. These agencies, whether subsidiaries or independent, received payment for their activities.

VII

Pursuant to the terms of the agreement, Leverkusen manufactured, sold and delivered all the aspirin required in the teritory until some time in 1939. Thereafter, likewise pursuant to the terms of the agreement, Bayer and its successor Sterling, manufactured, sold and delivered all the aspirin required in the territory. The aspirin was imported by the local agencies under the direction and control of Bayer, and the aspirin tablets were manufactured, packaged and sold by them, except in the smaller countries, where the local agencies were engaged solely in the sale of the finished products.

VIII

The contract, as amended and supplemented, was substantially performed by both parties thereto, and their successors, from its effective date until the summer of 1941, prior to the entry of the decree of September 5, 1941, to which reference is hereinafter made. The total profits were computed and reported to Leverkusen for each year, including the year 1940, in accordance with the terms of the contract, and 75% of the profits thus computed were remitted to Leverkusen as the funds were collected and received from the countries within the Latin American territory. Bayer retained its share of the profits. The payments to Leverkusen and its successor, I. G. Farben, were made regularly until late in the summer of 1941, immediately prior to the termination of the relationship between them.

Supplemental Agreement

IX

The predecessors of the parties to this litigation, Bayer and Leverkusen, entered into an agreement dated April 1, 1923 (Exhibit B), purportedly intended to settle certain disputes which had arisen between them. It appears that they were then major competitors in the manufacture and sale of drugs and pharmaceutical products. This agreement effected a world-wide division of the drug and pharmaceutical market between Bayer and Leverkusen. They agreed: first, to allocate specific territories to each of them and to a newly formed corporation in which each of them was to have an interest; second, to mutually transfer trademark rights with respect to such territories and according to the respective allocations; third, to cooperate to protect each other's markets and to eliminate competition; and fourth, to restrict imports and exports. The terms and conditions of the agreement are summarized in the opinion of Judge Weinfeld in the case of United States v. Bayer Company, D. C., 135 F.Supp. 65, at pages 68, et seq.

Laboratories Recalcine

(Hegemann)

X

Prior to 1937 a Chilean Company, Recalcine, was a competitor of Bayer engaged in the sale and distribution of aspirin products under the trade name "Aliviol." Sterling and the immediate successor to Leverkusen, I. G. Farben, agreed in 1937 to purchase the business of the said company, the entire purchase price to be advanced by Sterling. It was further agreed that Sterling and the successor to Leverkusen were to own, respectively, a 25% share, and a 75% share of the business.

XI

The business was acquired and was thereupon transferred to a newly organized company, Laboratorioe Hegemann y Cia., hereinafter identified as Hegemann. Between 1937 and 1941, Messrs. Pando and Hegemann, as nominees of Sterling, and with the consent and approval of I. G. Farben, were the registered record owners of 75% and 25%, respectively, of the capital stock of the newly organized company.

XII

The entire purchase price for the said business was advanced by Sterling. This advance was made pursuant to an agreement under which I. G. Farben's share of the purchase price, equal to 75% of its share in the business, would be repaid to Sterling out of its share of the profits of the "Aliviol" business and its share of the profits from the sale of aspirin and aspirin products in Chile under the 1920 contract. It is stipulated by the parties that by 1940, I. G. Farben's accrued shares of the profits were sufficient to satisfy the advance made on its behalf by Sterling.

Laboratorios Suarry
(Suarry)

XIII

Prior to 1937 an Argentinian company, Suarry, was also a competitor of Bayer engaged in the sale and distribution of aspirin products under the trade name "Geniol." These products were marketed in Argentina and other South American countries. Pursuant to an agreement similar to that under which the business of Recalcine was acquired, Sterling purchased 51% of the capital stock of Suarry and advanced the full amount of the purchase price. The stock certificates were in bearer form and were deposited with the National City Bank of New York, Buenos Aires Branch, in an account in the name of Sterling.

XIV

Pursuant to a letter of agreement dated April 19, 1938 (Exhibit D), Sterling purchased additional shares of the capital stock of Suarry and advanced the full amount of the purchase price. The stock certificates were in bearer form and were deposited with the National City Bank of New York, Buenos Aires Branch, in an account in the name of Sterling.

XV

The purchases of the capital stock in Suarry were made pursuant to an agreement under which I. G. Farben's share of the purchase price, equal to 75% of its interest in the business, would be repaid to Sterling out of its share of the profits of the "Geniol" business and its share of the profits from the sale of aspirin and aspirin products in Argentina under the 1920 contract. It is stipulated by the parties that by September 5, 1941, I. G. Farben's accrued shares of the profits were not sufficient to satisfy the advance made on its behalf by Sterling.

Termination of the Relationship

XVI

The representatives of Sterling, on August 13, 1941, met with the Interdepartmental Committee, a committee consisting of representatives of the Department of State, Treasury and Justice. It was after this meeting that Sterling, on August 14, 1941, cabled the successor to Leverkusen, I. G. Farben, as follows: "Present and proposed governmental restrictions make it necessary that we terminate our joint Latin American business enterprises while conditions still permit our doing so on negotiated basis. * * *. The aim and purpose is to dissolve all contracts, agreements, understandings, partnerships, and to divide jointly held property and to terminate all obligations and rights resulting from 1920 Latin American agreement." Exhibit F. The cable contained a proposal relating to the dissolution of the existing relationship and the division of the jointly held property. The proposal was rejected by I. G. Farben (Exhibits H and J).

XVII

A civil action to enjoin alleged violations of the antitrust laws was commenced by the United States of America under Section 4 of the Sherman Act, 15 U.S.C.A. § 4, on September 5, 1941. The complaint charged generally that Sterling, Bayer, and others had been engaged in "an unlawful combination and conspiracy to restrain trade and commerce in pharmaceutical products among and between the several states of the United States, the District of Columbia and with foreign nations," in violation of Section 1 of the Sherman Act, 15 U.S.C.A. § 1. The complaint alleged specifically that the contracts of 1920 and 1923, and others, were in furtherance of "the unlawful combination and conspiracy." See Paragraph 15 of the complaint, Exhibit M.

XVIII

The complaint alleged further: "The effect and result of the combinations, conspiracies and agreements hereinbefore alleged have been to give to I. G. Farben, its subsidiaries, affiliates or assigns the exclusive right to manufacture pharmaceutical products for the South and Central America and Mexican trade, to give to I. G. Farben, its subsidiaries, affiliates or assigns * * * seventy-five (75%) of the profits of Bayer from the sale of aspirin in South and Central America and Mexico, and otherwise to restrain interstate and foreign trade in pharmaceutical products." The exclusive right to manufacture pharmaceuticals did not include the exclusive right to manufacture aspirin for the Latin American market. See the 1920 contract. I. G. Farben was the successor to Leverkusen.

XIX

A final judgment was entered on the consent of the defendants on September 5, 1941. The final judgment contained the followning pertinent provisions:

> "III. 1. The Latin American contract dated October 28, 1920, between The Bayer Company, Inc. and Farbenfabriken vorm. Friedr. Bayer & Company [I. G. Farbenindustrie A. G. (its successor)] and all agreements amendatory or supplemental thereto between said parties are hereby adjudged and declared to be unlawful under the Anti-Trust Laws of the United States, and defendant The Bayer Company, Inc. is enjoined and restrained, subject to the provisions of Paragraph III (2) hereof from the further performance of any of their provisions.
>
> "2. The defendant The Bayer Company, Inc. is ordered and directed to terminate prior to December 31, 1941 all arrangements with I. G. Farbenindustrie A. G. and persons, firms or corporations in the Central and South American countries and Mexico operating

under the direction or control of I. G. Farbenindustrie A. G. for the distribution of aspirin, aspirin compounds or other drug products pursuant to said Latin American contract as amended or supplemented, and prior to such date to surrender any and all licenses for the use of trade-marks owned or controlled by said I. G. Farben, its successors or subsidiaries.

"3. Each of the defendants, and its respective successors and subsidiaries, is hereby enjoined and restrained from paying any royalties or shares of the profits pursuant to said Latin American contract as amended or supplemented."

XX

The intervention of World War II prevented strict compliance with Paragraph III (2) of the final judgment, supra. Bayer was unable to surrender the licenses acquired under the contract of 1920, and in lieu thereof renounced its rights thereunder. Formal renouncements of these license agreements were handed to the Attorney General of the United States and were accepted by him. Exhibits O and P. The trade-marks which had been licensed to Bayer under the contract of 1920 were subsequently seized as enemy property by the various Latin American governments.

XXI

It appears from the stipulation that after the entry of the consent decree Bayer discontinued the sale of aspirin products under the trade-marks in the Latin American markets. The local agencies were instructed "to continue to offer and sell aspirin products under such trademarks • • • until such time as aspirin products under new trademarks could be made available • • •." The aspirin business was undertaken by Sterling, and early in January of 1942, aspirin products were made available under new trademarks coined and registered by it. The products were sold and distributed by the Sidney Ross Company and Sterling

Products International, subsidiaries of Sterling, under the registered trade name "Mejoral."

XXII

The assets of Hegemann were transferred to a new company, Laboratorios Aliviol, on December 27, 1941. The new company was wholly owned by Sterling and its subsidiaries. The assets of Suarry were transferred to a new company, Laboratorios Suarry, on November 27, 1941. Sterling held an 86% interest in the new company. Thereafter Suarry was dissolved and a certificate of dissolution was filed on January 13, 1942.

First Cause of Action

The plaintiff asserts a claim for profits allegedly due for the years of 1940 and 1941 under the contract of 1920. It is alleged that the balance due for the year of 1940 is unknown and that the balance due for the year of 1941 is "at least $500,000, although the exact amount is not known." This claim is resisted by the defendant on the ground that the contract was in violation of the antitrust laws and, therefore, illegal.

[1] The illegality of the contract cannot be denied. It was adjudged to be in violation of the antitrust laws and, therefore, illegal. United States of America v. Alba Pharmaceutical Co., Inc., et al., Exhibit N; see also, Paragraph XIX, supra. While the predecessor of the plaintiff was not a party to the earlier litigation, the final judgment is nevertheless determinative of the question of illegality. However, it is not necessary for this Court to rely solely on the prior adjudication. It clearly appears, from the record before the Court that the contract of 1920 and the subsequent supplemental agreements were in restraint of trade and commerce and, therefore, illegal. 15 U.S.C.A. § 1; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 199; United States v. Bayer Co., D.C.S.D.N.Y., 135 F.Supp. 65. It follows that this claim of the plaintiff may not be enforced in this action.

The applicable rule was succinctly stated in the case of Bruce's Juices v. American Can Company, 330 U.S. 743, at page 755, 67 S.Ct. 1015, at page 1020, 91 L.Ed. 1219: "This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect [the] accomplishment of illegal ends which would be consummated by the judgments sought, the Court will entertain the defense that the contract in suit is illegal under the express provision[s] of that statute."

It was held earlier in the case of Continental Wall Paper Co. v. Louis Voight and Sons Co., 212 U.S. 227, at page 262, 29 S.Ct. 280, at page 292, 53 L.Ed. 486:

> "* * * a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interest of individual parties."

There can be no doubt that the rule is applicable here and bars the enforcement of the plaintiff's first cause of action.

The plaintiff presents no specific argument in support of its first cause of action but appears to rely on the case of Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 430, 3 L.Ed.2d 475. There a seller brought an action to recover the purchase price due for a shipment of onions. The purchaser defended on the ground that the sale was made "pursuant to and as an indivisible part of an agreement which violated § 1 of the Sherman AntiTrust Act * * * as amended, 15 U.S.C. § 1, 15 U.S.C.A. § 1." It appears from the summary of the facts that the agreement to purchase the onions was incidental to a contract in restraint of trade. It was held

that in these circumstances the defense of illegality is not available. The decision rested on the exception to the general rule.

The exception to the general rule established in the case of Continental Wall Paper Co. v. Louis Voight and Sons Co., supra, was clearly defined in the case of Bruce's Juices v. American Can Co., supra: "But when the contract sued upon is not *intrinsically illegal*, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act *not inhering in the particular contrac in suit and* has reaffirmed the 'doctrine' that "where a statute * * * gives a new right and declares the remedy, * * * the remedy can be only that which the statute prescribes." ' " (Emphasis by this Court.)

The case of Kelly v. Kosuga is clearly distinguishable from the case now before this Court. The plaintiff here seeks to enforce a claim for its share of the profits allegedly due under a contract intrinsically illegal. The first cause of action is governed by the general rule and not the exception.

It is further argued by the defendant that the payment of profits under the contract of 1920 is expressly prohibited by the final judgment entered in the earlier litigation. The argument does not require extensive discussion. The final judgment provides as follows: "Each of the defendants, and its respective successors and subsidiaries, is hereby enjoined and restrained from paying any royalties or share of the profits pursuant to said Latin American contract as amended or supplemented." Subdivision III, paragraph 3. It is evident that payment of profits under the contract would violate the injunction.

Second Cause of Action

[2] The plaintiff asserts a claim to a 75% proprietary interest in the aspirin business established by the defendant in the Latin American territories after the entry of the final judgment, supra, and thereafter developed by the de-

fendant's subsidiaries (Paragraph XXI, supra). The plaintiff seeks a declaratory judgment consistent with this claim and an accounting "with respect to said business." The theory upon which this claim is predicated seems to us to be ingenious.

The claim of the plaintiff is based upon the following allegations: first, that under the contract of 1920 the predecessors of the plaintiff, Leverkusen and I. G. Farben, and the predecessor of the defendant, Bayer, had been engaged in a "joint venture" for a period of twenty years prior to the entry of the final judgment; second, that the "joint venture" developed a large and profitable business in aspirin products in the Latin American countries; third, that upon the entry of the final judgment the defendant appropriated and converted to its own use the entire business of the "joint venture" including I. G. Farben's 75% interest therein; and fourth, that the defendant appropriated and converted to its own use upwards of $500,000, due the plaintiff's predecessor under the contract of 1920, and used these monies in furtherance of the new business. The defendant, of course, denies these allegations; however, we shall adopt them solely for the purpose of discussion.

It is argued by the plaintiff that the interest of its predecessors in the "joint venture" is, and has been, held in trust by the defendant and that the defendant is accountable to the plaintiff for that interest evaluated as of now. The argument overlooks an important factor: the predecessors of the plaintiff and the predecessors of the defendant had been engaged in an unlawful combination and conspiracy in restrain of trade and commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C.A. § 1, and by reason thereof the contract of 1920, in addition to other contracts, was adjudged unlawful. The proprietary interest here claimed by the plaintiff had its origin in the illegal contract and any rights thereunder to which the plaintiff has succeeded may not be enforced in this action. See Rutkin v. Reinfeld, 2 Cir., 229 F.2d 248, 252 et seq.; Bishop v.

American Preservers Co., 157 Ill. 284, 41 N.E. 765, 773, et seq. The enforcement of a right to such an interest would require recognition of hte lilegal contract and the right of the plaintiff to recover profits thereunder or their equivalent in property.

The mere fact that the plaintiff has here elected to label the relationship a "joint venture" is of no avail. "The fact that there is [a] common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. (Citation omitted.) Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." Timken Roller Bearing Co. v. United States, supra, 341 U.S. at page 598, 71 S.Ct. at page 974.

However, we cannot agree with the contention of the plaintiff that its predecessors, Leverkusen and I. G Farben, and the predecessor of the defendant, Bayer, had been engaged in a joint venture for a period of twenty years prior to the entry of the final judgment. The dominant purpose of the contract of 1920 was the creation of a combination in restraint of trade and commerce, but the contract did not create a joint venture. This clearly appears from the facts recited in Paragraphs III to VII, inclusive, supra. The contract contained the usual terms and conditions of a license agreement and the contractual relationship between the parties lacked the essential attributes of a joint venture. Joe Balestrieri & Co. v. Commissioner of Internal Revenue, 9 Cir., 177 F.2d 867, 871; Detachable Bit Co. v. Timken Roller Bearing Co., 6 Cir., 133 F.2d 632, 635.

The statement of the Court of Appeals of New York in the case of Steinbeck v. Gerosa, 4 N.Y.2d 302, 175 N.Y.S.2d 1, at page 13, 151 N.E.2d 170, at pages 178 and 179, is apposite. It was therein stated: "An agreement to distribute

the proceeds of an enterprise upon a percentage basis does not give rise to a joint venture if the enterprise does not represent a joinder of property, skills and risks (Gordon Co. v. Garcia Sugars Corp., 241 App.Div. 155, 271 N.Y.S. 303). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit * * *." (Hasday v Barocas, 10 Misc.2d 22, 28, 115 N.Y.S.2d 209, 215.) The present case does not reveal such an amalgam of property or interests as would create a joint venture."

The relationship of the parties was governed by the express terms of the contract. It appears therefrom that Bayer acquired an exclusive right to the use of the Leverkusen trade-marks in connection with the sale and distribution of aspirin products in the several Latin American countries, and in return Leverkusen was to receive 75% of the net profits earned by Bayer. The business was to be conducted solely by Bayer. The contract did not provide for either a joint control of their individual properties or a right to common management of the business. It is of further significance that Leverkusen did not agree to share jointly in the losses of the business. The contractual relationship between the parties was not such as to require an accounting upon its termination.

Third Cause of Action

The plaintiff here asserts a claim for damages for the alleged breach of the contract of 1920. This claim for damages is in the alternative. The complaint alleges that the actions of the defendant in 1941, and thereafter, constituted a breach of the said contract. It is further alleged that as a result of this breach of contract the plaintiff "lost its interest in a valuable going business which defendant

appropriated to itself and its share of the profits of that business."

We find it difficult to ascertain the theory upon which this cause of action is based, and the briefs submitted on behalf of the plaintiffs are of little or no assistance. The contract was adjudged unlawful under Section 1 of the Sherman Act, supra, and the rights of the parties thereunder were terminated as of September 5, 1941, when the final judgment was entered. We cannot perceive how the subsequent actions of the defendant may be regarded as a breach of that contract. There is, however, a simple answer: the plaintiff may not maintain an action for damages based upon the alleged breach of an illegal contract.

However, if the claim here asserted is one for profits wrongfully withheld, the plaintiff is in no better position. These profits are not recoverable for the reasons discussed under the heading "First Cause of Action."

Fourth Cause of Action

The plaintiff asserts a 75% proprietary interest in the businesses of Hegemann and Suarry purchased by the defendant in 1937 and 1938. It is alleged that this proprietary interest is, and has been since the acquisition of the business, held in trust by the defendant for the benefit of the plaintiff. The plaintiff demands that the Court impress a trust upon the said businesses and that the defendant be compelled to render an account. The claim of the plaintiff and the right to relief is resisted by the defendant on the grounds of illegality.

These businesses were purchased by Sterling pursuant to agreements, the essentials of which are summarized in Paragraph X to XV, inclusive, supra. The purchase of these businesses eliminated competitors of Bayer in Chile and Argentina. It seems reasonably clear that the agreements pursuant to which these businesses were purchased were supplemental to the contract of 1920 and were in furtherance of the combination and conspiracy in restraint of trade and commerce. It is here stipulated that I. G. Farben's

share of the purchase price for each of the said businesses was to be paid in part from its share of the profits under the contract of 1920. These agreements, like the contract of 1920, were intrinsically illegal.

The claim of the plaintiff to a proprietary interest in the said businesses assumes no greater posture than the claim for profits under the contract of 1920. The enforcement of the claim to a proprietary interest would permit the plaintiff to reap the fruits of the illegal agreements. Where parties concerned in illegal agreements are in pari delicto, the law will not aid either party, but will leave them without remedy against each other. See the cases hereinabove cited.

Statute of Limitations

[3] The present action was commenced on September 28, 1955, when the complaint was filed with the clerk of the court. Rule 3 of the Federal Rules of Civil Procedure, 28 U.S.C.A. It is agreed that the causes of action asserted therein accrued on September 6, 1941, or immediately thereafter, approximately three months prior to the formal declaration of war between the United States and Germany, to wit, December 11, 1941.

The defendant moves to dismiss the legal claim stated in the third count of the complaint (Third Cause of Action) on the ground that its enforcement is barred by the statute of limitations, N.J.S.A. 2A:14-1. The pertinent provisions of the statute read as follows: "Every action at law * * *, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, * * *, or for recovery upon a contractual claim or liability, express or implied, not under seal, * * *, shall be commenced within 6 years next after the cause of any such action shall have accrued." The plaintiff does not dispute the applicability of the statute.

The plainitff had been an enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act of 1917, 50 U.S.C.A.Appendix, § 2(a), and it is conceded by the

parties that its procedural right to prosecute the present action was suspended during the period of the war. However, they disagree as to when the period of suspension terminated.

It is argued by the defendant that the suspension and the consequent disqualification of the plaintiff terminated on December 31, 1946, when the President of the United States formally proclaimed "the cessation of hostilities of World War II, effective twelve o'clock noon," on the said date. Proclamation No. 2714, U.S. Code Congressional Service 1947, page 1895, 50 U.S.C.A.Appendix, § 601 note. It is argued by the plaintiff that the suspension and consequent disqualification terminated upon the approval of the President, on October 19, 1951, of House Joint Resolution No. 289, entitled, "Joint Resolution to terminate the state of war between the United States and the Government of Germany." 50 U.S.C.A.Appendix preceding section 1, p. XX. The question presented for decision is thus sharply defined.

The United States Court of Appeals, Third Circuit, has heretofore sustained the right of the plaintiff to maintain the present action notwithstanding the fact that the fruits of recovery remained subject to seizure and vesting under House Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A. Appendix, page XX preceding section 1. Farbenfabriken Bayer A. G. v. Sterling Drug, 3 Cir., 251 F.2d 300, 303, 305. The question now before this Court was not before the Court of Appeals and was, therefore, not decided. It was expressly stated in the opinion: "Whether or not Farben could have maintained its suit during the period from December 31, 1946 to October 19 or 21, 1951, is a question with which we need not concern ourselves for the suit at bar was commenced on September 28, 1955." The argument advanced in support of the present motion makes it necesary to decide the question.

There are several cases in which the Supreme Court has had occasion to treat of the terms "end of war" and "time of peace," e.g., United States ex rel. Knauff v. Shaughnessy,

338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317; Ludecke v. Watkins, 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 881; Wood v. Cloyd W. Miller Co., 333 U.S. 138, 68 S.Ct. 421, 92 L.Ed. 596, and Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375. These are cases in which the Supreme Court was called upon to decide what effect, if any, the cessation of hostilities had upon existing legislation, and particularly statutory war powers. It is clear that in these cases the Court regarded the political act of branches of the Government, other than the Judiciary, as necessary to the termination of war. We are of the opinion that these cases do not point to the solution of the problem now before us.

The case of Lee v. Madigan, 358 U.S. 228, 79 S.Ct. 276, 278, 3 L.Ed.2d 260, although not directly in point, is relevant. Therein the Supreme Court was called upon to construe the meaning of the words "in time of peace" in the context of Article of War 92, 10 U.S.C. (1946 ed. Supp. IV) § 1564. Therein, and for the purpose of the particular case before it, the Court declined to follow the axiom that "the termination of war is a political act." The Court stated, 358 U.S. at pages 230 and 231, 79 S.Ct. at page 278: "A more particularized and discriminating analysis must be made. We deal with a term that must be construed in *light of the precise facts of each case* and the impact of the particular statute involved." (Emphasis by this Court.) We are of the opinion that a like approach must be followed in the case now before us. The determination as to when the war ended, at least for the purpose of the present litigation, should be based upon a consideration of the facts and the equities in the light of the common law rule hereinafter discussed.

We find support for this approach in the opinion of the United States Court of Appeals, Farbenfabriken Bayer A. G. v. Sterling Drug, supra. It was therein held, 251 F.2d at page 303: "Nothing in the Act [Trading with the Enemy Act] prohibits an enemy alien from maintaining a suit in

our courts. In respect to the bringing of suits Section 7(b) of the Act provides in pertinent part: 'Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war * * *.' *In short Congress in respect to an enemy maintaining a suit within the United States was content to rely on decisional or common law.*" (Emphasis by this Court.) See also Ex parte Colonna, 314 U.S. 510, 511, 62 S.Ct. 373, 86 L.Ed. 379.

The earlier rule under which an enemy alien, whether resident or non-resident, was denied access to the courts during the period of war, was a rule of common law. When it was found incompatible with our concepts of justice, exceptions and modifications were engrafted upon it by decisional law. It was held by the Supreme Court in the case of Ex parte Kawato, 317 U.S. 69, at page 75, 63 S.Ct. 115, at page 118, 87 L.Ed. 58: "The ancient rule against suits by resident alien enemies has survived only *so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy.* This may be taken as the sound principle of the common law today." (Emphasis by this Court.)

An exception to the strict common law rule was recognized by the Supreme Court in the case of Birge-Forbes Co. v. Heye, 251 U.S. 317, 40 S.Ct. 160, 161, 64 L.Ed. 286. Therein the Court sustained a judgment in favor of a resident of Bremen, Germany, who "had become an alien enemy by reason of the declaration of war between Germany and the United States." The judgment was first sustained by the Circuit Court of Appeals after the declaration of war. It is stated in the opinion of the Supreme Court, 251 U.S. at page 323, 40 S.Ct. at page 161: "There is nothing 'mysteriously noxious' (Coolidge v. Inglee, 13 Mass. 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would *give aid and comfort to the other side.*" (Emphasis by this Court.) It should be

noted that the judgment provided for the payment of the sum recovered to the Alien Property Custodian.

The rights of an enemy alien under the common law rule was considered by the United States Court of Appeals, Third Circuit, in the case of Petition of Bernheimer et al., 130 F.2d 396. It is stated in the opinion at page 397: "It is not even the case that a suit may not be prosecuted on behalf of an enemy subject *even though resident in enemy or neutral territory.* Such suits are *occasionally allowed* to proceed to judgment where *adequate measures may be taken to prevent advantage to the enemy.*" (Emphasis by this Court.) There followed a discussion of the protective measures then available to prevent the transfer of the proceeds of the judgment to the enemy. The same protective measures were in effect and available during the period here in question and even prior thereto.

The precise question before this Court is whether or not the present action could have been brought after December 31st, 1946 and prior to June 25th, or thereabouts, 1949. It must be remembered that three months of the period of limitation had expired before the operation of the statute of limitations was suspended by the declaration of war. If the answer to the question is in the affirmative then the right of the plaintiff to maintain the action on the claim for breach of contract, asserted in the third count of the complaint (Third Cause of Action), is barred. The determination of the question, as we have heretofore indicated, should be based upon the consideration of the facts and equities in the light of the common law rule.

The hostilities between the United States of America and the Republic of Germany were terminated on May 8, 1945, upon the unconditional surrender of the latter. U.S. Code Congressional Service, 1945, pages 1014 to 1016, inclusive. The unconditional surrender was followed by the immediate occupation of Germany by the Allied Powers. These Powers assumed complete and absolute control over the German state on June 5, 1945. The conflict was not

thereafter resumed. The cessation of hostilities was formally proclaimed by the President of the United States on December 31, 1946. Proclamation No. 2714, 12 F.R. 1, and also U.S.Code Congressional Service, 1947, page 1895, 50 U.S.C.A.Appendix, § 601 note. Thereafter, on February 10, 1947, separate treaties of peace were concluded with Italy, Bulgaria, Hungary, Roumania and Finland. U.S.Code and Congressional Service, 1947, at page 2321 et seq., 50 U.S.C.A.Appendix preceding section 1.

The right of Germany to resume trade was granted under General License No. 94, effective December 31, 1946. 31 C. F.R. 131.94, 1947 Supp., at page 4539. This license also authorized "any transaction which could be effected under § 131.53 (General License No. 53) if the countries licensed • • • were members of the generally licensed trade area." The only restriction in the said license related to property and income from property subject to vesting and seizure prior to the said effective date. The commercial and trade relations between the United States and Germany were resumed subject only to the restrictions contained in the license.

The Senate Committee on the Judiciary on June 23, 1947, in recognition of the cessation of hostilities, recommended the passage of Senate Joint Resolution 123, which had for its object the termination of "certain emergency and war powers." Senate Report No. 339; United States Code Congressional Service, 1947, page 1359 et seq. The Joint Resolution was approved on July 25, 1947. 61 Stat. 449. It repealed many of the temporary statutes enacted during World War II and terminated the war and existing emergencies with respect to certain other statutory provisions which are in effect only during a period of war or emergency.

The Federal Republic of Germany, embracing the zones then occupied by the forces of the United States, Great Britain and France, was proclaimed at Bonn, its capital, on May 23, 1949, and came into formal existence on September 21, 1949. The proclamation followed the adoption of

the Basic Law, a democratic constitution adopted on May 12, 1949, and approved by the Allied Control Council. The elections were held on August 14, 1949, and thereafter, on September 21, 1949, the new government was formally established under Theodor Heuss, as President, and Konrad Adenauer, as Chancellor. The Allied military government was disestablished and, except as to military and foreign affairs, the Western powers retained only supervisory authority exercised through the Allied High Commission.

The rule under which a nonresident enemy alien is denied access to the courts is one of common law. It is applied only in "time in war" to prevent use of the courts to accomplish a purpose which might impede the war effort or give aid and comfort to the enemy. The provision of Section 7(b) of the Trading with the Enemy Act, supra, 50 U.S.C.A.Appendix, § 7(b), has been construed as Congressional recognition of the common law rule established by judicial decision long prior to the Act. Ex parte Colonna, supra; Farbenfabriken Bayer A. G. v. Sterling Drug, supra.

It appears from the reported decisions that the meaning of the term "time of war" is flexible and must be interpreted in the sense in which it is used in the law. Lee v. Madigan, supra, 358 U.S. at page 231, 79 S.Ct. at pages 278. We are of the opinion that where, as here, we are concerned only with the rights of private litigants, the term must be interpreted in the sense in which it is used in the common law rule. We are of the further opinion that the interpretation is one for judicial determination in light of the precise facts.

The United States Court of Appeals in Farbenfabriken Bayer A. G. v. Sterling Drug, supra, in reference to Section 7(b) of the Act, supra, stated: "* * *, we are of the opinion that a failure to authorize a suit is *a bar to suit when the strict common law rule that an enemy cannot maintain a suit in our courts is in effect*, * * *." [251 F.2d 303.] (Emphasis by this Court.) If we interpret this

language correctly, it is the opinion of the United States Court of Appeals that the provision of Section 7(b) of the Act is applicable only when the common law rule "is in effect" in the courts. The rule is "in effect" in the courts during the period of war when its application is "necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy." [317 U.S. 69, 63 S.Ct. 118.]

We are of the opinion that the present action could have been brought prior to June 25, 1949. It clearly appears from the historical facts that by May 23, 1949, when the Federal Republic of Germany was proclaimed, there had been a cessation of hostilities without any intention on the part of either party to resume the conflict. The emergency and war powers created by statute, with certain exceptions, had been terminated, and commercial and trade relations between Germany and the United States had been restored. The application of the common law rule was no longer "necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy." It follows that the third cause of action is barred by the statute of limitations.

The defendant moves to dismiss the claim for profits asserted under the "First Cause of Action" on the ground that its prosecution is barred by the doctrine of laches. This claim is essentially a legal claim for breach of contract based upon the failure of the defendant to make payment of the profits due under the contract of 1920. It is our opinion that this claim is barred by the statute of limitations. However, if it is regarded as a claim for an accounting cognizable in equity, it is barred by the doctrine of laches for the reasons hereafter considered.

Doctrine of Laches

The defendant moves to dismiss the claims asserted under the "Second Cause of Action" and "Fourth Cause of Action", supra, on the ground that they are barred under

the doctrine of laches. These are claims to a proprietary interest in certain businesses and are supported by the charge that upon termination of the "joint venture" upon the entry of the final judgment, supra, the defendant appropriated and converted the assets of the businesses to its own use. These are essentially claims for the unlawful conversion of property and, therefore, the right of the plaintiff to prosecute them is governed by the express language of the statute of limitations, supra.

[4, 5] However, for the purposes of the present motion we shall regard the action as one in equity to compel an accounting and to settle a controversy between joint venturers. Such an action is cognizable either in a court of law or a court of equity; the jurisdiction of these courts in this type of action is concurrent. While the statute of limitations is no bar to an action in equity, its provisions may be invoked as a guide where the action is one also cognizable at law. Conover v. Wright, 6 N.J.Eq. 613; Arnett v. Finney, 41 N.J.Eq. 147, 3 A. 696; Depew v. Colton, 60 N.J.Eq. 454, 46 A. 728; Bahr v. Breeze Corporations, 126 N.J.Eq. 124, 8 A.2d 185. It is well established that where there is both a legal and an equitable remedy for the same wrong, if the legal remedy is barred by the lapse of time, the equitable remedy is also barred. Ibid. The rule is applicable to an action in equity to enforce an implied or constructive trust. Condit v. Bigalow, 64 N.J.Eq. 504, 54 A. 160.

[6] Since the jurisdiction of the Court in the present action is based on diversity of citizenship and is invoked under Section 1332(a) (2) of Title 28 U.S.C.A., the local rule is applicable. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079; Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527, 84 L.Ed. 754. It was held in the case of Russell v. Todd, 309 U.S. at page 289, 60 S.Ct. at page 532: "Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law,

or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations."

It follows that if the claims asserted under the "Second Cause of Action" and the "Fourth Cause of Action" are legal claims for the unlawful conversion of property, they are barred by the statute of limitations. If they are regarded as equitable claims, they are barred under the doctrine of laches.

The motion for summary judgment filed by the defendant is granted for the reasons stated. The motion for summary judgment filed by the plaintiff is dismissed. The attorneys for the defendant shall prepare and submit to the Court, on notice to the attorneys for the plaintiff, an appropriate order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 652

FARBENFABRIKEN BAYER A. G.,
Petitioner,

v.

STERLING DRUG INC.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN T. CAHILL,
Attorney for Respondent,
80 Pine Street,
New York 5, New York.

Of Counsel:

GEORGE S. HILLS,
41 East 42nd Street,
New York 17, New York.

ROBERT G. ZELLER,
WILLIAM A. JANSEN,
80 Pine Street,
New York 5, New York.

January 10, 1963.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Sterling Drug Inc., respondent herein, respectfully submits that the Petition for a Writ of Certiorari in this case should be denied for the reasons hereinafter set forth.

Opinions Below.

The opinion of the United States Court of Appeals for the Third Circuit, filed August 9, 1962, is reported at 307 F. 2d 207 and is annexed as Appendix A to the Petition.

The opinion of the United States District Court for the District of New Jersey, filed July 27, 1961, is reported at 197 F. Supp. 613, is annexed to the Petition as Exhibit B, and appears at pages 268a-92a of the printed Appendix prepared by petitioner for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4).

Questions Presented.

1. Should this Court grant certiorari to review a unanimous decision of the Court of Appeals affirming, on a single ground, a District Court decision which dismissed petitioner's complaint upon that ground and upon alternative and independently valid grounds?

2. Should this Court grant certiorari to review such a decision where, in addition to the grounds on which the courts below relied, respondent is exempted from liability by the provisions of (a) the Trading with the Enemy Act and (b) the Bonn Convention of 1952 with the Federal Republic of Germany because the acts of which petitioner complains were performed by respondent at the direction of the United States Government as part of a program of economic warfare against Germany following the commencement of World War II in Europe?

3. Did the Court of Appeals err in affirming dismissal of petitioner's complaint on the ground that it seeks a share of the profits arising under a contract which was admittedly illegal under the United States antitrust laws?

4. Does the decision of the Court of Appeals have an undesirable effect upon commercial relationships between American and foreign companies where the record demonstrates that (a) the contract establishing the relationship in the present case was illegal in its entirety under American antitrust laws and (b) respondent, the American company, has not since termination of the relationship retained any properties provided by the foreign company?

Introduction.

Petitioner, Farbenfabriken Bayer A. G. (herein called "Farben"*), is a corporation organized under the law of the Federal Republic of Germany (App.** 60a). On September 28, 1955, it filed this action against respondent, Sterling Drug Inc. (formerly Sterling Products Incorporated]; herein called "Sterling"***), a corporation organized under the law of the State of Delaware, for relief arising out of an alleged relationship between the predecessors of the present parties in the conduct of an aspirin business in Latin America (App. 5a-21a). That business was conducted pursuant to an agreement executed in 1920 (herein called the "1920 Contract") (App. 15a-21a), which eliminated competition in Latin America between said predecessors in sales of aspirin and aspirin products. It is undisputed that the 1920 Contract violated section 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. §1 (1958).

On February 5, 1957, the District Court filed an opinion dismissing this action without prejudice on the ground that Farben was still an enemy alien with respect to the subject

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* "Farben" is also used herein to refer, individually and collectively, to both petitioner and its alleged predecessors, I. G. Farbenindustrie A. G. (herein also called "I. G. Farben") and Farbenfabriken vorm. Friedrich Bayer & Company, both German corporations. The alleged succession is disputed by respondent but was conceded for the purposes of respondent's motion for summary judgment.

** "App." is used herein to refer to the printed Appendices prepared by the parties for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4). "Pet." and "Pet. App." are used herein to refer, respectively, to the Petition and to the opinions of the Court of Appeals and the District Court which are annexed as Appendix A and Appendix B to the Petition.

*** "Sterling" is also used herein to refer, individually and collectively, to both respondent and its predecessor, The Bayer Company, Inc., a New York corporation.

matter of its claims, and as such was disqualified to enforce them in an American court, 148 F. Supp. 733 (App. 46a-51a). That decision was reversed by the United States Court of Appeals for the Third Circuit in an opinion filed January 2, 1958, 251 F. 2d 300 (App. 51a-58a). A petition for a writ of certiorari was denied by this Court, 356 U. S. 957.

After remand, Sterling moved, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment in the District Court on June 1, 1958 (App. 59a-60a).

The District Court postponed oral argument and decision of Sterling's motion while it conducted certain pretrial proceedings. As a result of those proceedings, Farben and Sterling joined in a lengthy and detailed stipulation of fact (App. 60a-138a). The facts on which Sterling relies in support of its motion are taken from that stipulation, the complaint and certain public records.

Thereafter, on October 29, 1959, a motion pursuant to Rule 56 for summary judgment was also filed by Farben (App. 139a-40a).

In an opinion filed July 21, 1961 (App. 268a-92a; Pet. App. 8a-34a), the District Court granted Sterling's motion and entered final judgment in Sterling's favor (App. 292a-93a). It held that Farben's claims were barred because (1) they seek payment of a share of the profits of an admittedly unlawful enterprise, (2) they seek relief which would require Sterling to violate the provisions of the decree entered against it in *United States* v. *Alba Pharmaceutical Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,150 (S. D. N. Y. 1941) (App. 21a-31a), and (3) the complaint was filed long after the period prescribed by the applicable statute of limitations and the doctrine of laches. Farben's motion was dismissed without opinion (App. 293a).

An appeal was taken by Farben to the United States Court of Appeals for the Third Circuit, which, on August 9, 1962, filed a unanimous opinion affirming the judgment of the District Court (Pet. App. 1a-7a). The Court of Appeals did not discuss the applicability of the *Alba* decree, the statute of limitations or the doctrine of laches. It held simply that each of the four causes of action in the complaint sought enforcement of the provisions of an illegal contract which was not a joint venture, and, as such, was barred.

A Petition for Rehearing or, in the Alternative, for Clarification was denied by the Court of Appeals without opinion on September 11, 1962.

Counter-Statement of the Case.

Petitioner succeeded in 1953 to part of the pharmaceutical business conducted by I. G. Farben from 1926 to 1953 (App. 60a). I. G. Farben had succeeded in 1926 to the business conducted from 1863 to 1925 by Farbenfabriken vorm. Friedrich Bayer & Company (*ibid.*).

In 1913 Farbenfabriken vorm. Friedrich Bayer & Company caused the incorporation of a wholly-owned subsidiary, The Bayer Company, Inc. (herein called "Bayer"), under the law of the State of New York (App. 61a). Bayer's business included the manufacture and sale of aspirin in the United States (App. 6a).

In January 1918, after the United States had declared war on Germany, all of the assets of Farbenfabriken vorm. Friedrich Bayer & Company in the United States, including the capital stock of Bayer, were vested by the United States Alien Property Custodian pursuant to the Trading with the Enemy Act, 40 Stat. 416 (1917), as amended, 50 U. S. C. App. §7(c) (1958) (App. 62a).

In December 1918, the Alien Property Custodian sold all of the vested assets of Farbenfabriken vorm. Friedrich Bayer & Company, including the capital stock of Bayer, to Sterling at public auction pursuant to authority conferred by the Act, 40 Stat. 423 (1917) (amended by 40 Stat. 460 (1918)), as amended, 50 U. S. C. App. §12 (1958) (App. 62a). Sterling thereafter operated Bayer as a subsidiary until its merger into Sterling as of December 31, 1942 (App. 61a).

The 1920 Contract.

At some time prior to 1920, Bayer had begun the sale of aspirin and aspirin products in Latin America (App. 7a, 15a-16a). In 1920, after more than a year of negotiations, Farben and Bayer entered into the 1920 Contract, which, as previously stated, eliminated competition between the parties in such sales in Latin America for the 50-year term of the contract (App. 15a-21a, 62a).

Under the agreement Farben acquired ownership of all of Bayer's Latin American trademarks and trade names relating to those products and exclusively licensed their use, together with the use of the same or other trademarks held by Farben in various Latin American countries, to Bayer (App. 15a, 16a). Bayer thereafter conducted the aspirin business entirely with its own capital in accordance with the agreement (App. 63a-65a). The contract gave Farben no voice in management of the business.

In so doing, Bayer was required under the agreement to utilize local agencies of the German company wherever possible (App. 16a, 63a-65a). Bayer was also required to purchase its requirements of aspirin powder from Farben if the latter's cost of manufacturing were lower than Bayer's (App. 16a). Farben, which neither risked capital in the enterprise nor shared in its losses but which then owned the

all-important trademarks, received 75% of the profits and Bayer received 25% (App. 16a, 65a).

The contract contained no provision for the continued use by Sterling of Farben's trademarks after its termination, nor did it provide that Farben was to receive anything from Sterling upon such termination.

The 1923 Contracts.

In April of 1923, Farben and Sterling and certain of its then affiliates or subsidiaries entered into several agreements (herein called "the 1923 Contracts") (App. 62a-63a), which have been described as "the usual form of international cartel arrangement", *General Aniline & Film Corp.* v. *The Bayer Co.*, 188 Misc. 929, 930, 64 N. Y. S. 2d 492 (Sup. Ct. N. Y. Co. 1946), *aff'd*, 281 App. Div. 668, 117 N. Y. S. 2d 497 (1st Dep't 1952), *aff'd*, 305 N. Y. 479, 113 N. E. 2d 844 (1953), quoted with approval in *United States* v. *The Bayer Co.*, 135 F. Supp. 65, 69 (S. D. N. Y. 1955). It is conceded that these contracts were also in violation of section 1 of the Sherman Act, *supra*. They provided for a division of world sales territories in pharmaceuticals and other products for a minimum term of 50 years (App. 71a-98a).

It is undisputed that the 1920 Contract and the 1923 Contracts, as amended and supplemented, were substantially performed by both parties thereto and their successors from their effective date until some time in the summer of 1941.

I. G. Farben, which was organized in 1925 through a merger of Farbenfabriken vorm. Friedrich Bayer & Company and seven other German corporations, succeeded Farbenfabriken vorm. Friedrich Bayer & Company as a party to the 1920 Contract and the 1923 Contracts (App. 63a).

The Acquisition of Suarry and Hegemann.

In 1937 and 1938, in furtherance of and supplemental to the 1929 Contract, Farben and Bayer agreed to acquire two Latin American companies which were then engaged in competition with Bayer in the manufacture and sale of aspirin products in Latin America. These competitors were Laboratorios Suarry S.A. (hereinafter called "Suarry"), organized in Argentina, and Laboratorios Recalcine, organized in Chile (App. 66a-67a).

A 51% stock interest was acquired in Suarry (App. 67a), and substantially all of the assets of Laboratorios Recalcine were acquired (App. 66a). The business acquired from Laboratorios Recalcine was taken in the name of Laboratorios Hegemann y Cia., Ltda. (hereinafter called "Hegemann"), also a Chilean concern (*ibid.*).

Bayer, pursuant to the agreement between the parties, advanced the entire purchase price in both cases (App. 66a, 67a). Farben, which was to have a 75% share of the interests so acquired, was to pay its 75% share of the purchase price from its 75% share of their respective profits, and from its 75% share of the profits under the 1929 Contract arising from the sale of aspirin and aspirin compounds in Argentina and Chile, respectively (*ibid.*).

Investigations by the Government in 1941.

During 1941 the Antitrust Division of the Department of Justice conducted an investigation of Sterling over a five-month period under a grand jury subpoena (App. 15b). This investigation was conducted in the United States District Court for the Southern District of New York under the direction of Thurman Arnold, then head of the Antitrust Division and now counsel for Farben in the present case (*ibid.*).

After Mr. Arnold's investigation, Sterling entered into negotiations with him concerning the form of a decree that would meet his requirements to dispose of the antitrust problems (*ibid.*).

Proposed decrees were submitted by Sterling to Mr. Arnold early in August 1941 (*ibid.*). Mr. Arnold replied in a letter dated August 24, 1941, confirming statements made by him in a conference with Sterling on August 12, 1941. He stated:

> "It is the considered conclusion of this Department that it cannot accept the proposed form of decree in settlement of the questions which have arisen out of the investigation of Sterling Products (Incorporated) and its subsidiary companies now being conducted by the Antitrust Division. The investigation is particularly concerned with the following contracts: [all ten of the illegal contracts entered into between 1920 and 1938, including the 1920 and 1923 contracts, were identified].
>
> "*It is our view that all of these contracts are illegal in their entirety and that any consent decree entered in this case must declare the contracts to be illegal in their entirety and enjoin their future performance.* The proposed decree which you have submitted to us does not meet this requirement.
>
> . . . . . .
>
> "As we have previously indicated to you, the Department is always reluctant to discuss a consent decree settlement when an investigation looking toward a criminal proceeding has been initiated. Inasmuch, however, as your present proposal is unacceptable to us, we now shall have no recourse but to permit the criminal proceeding to take its normal course." (R. pp. 15b-16b).*

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* Emphasis supplied throughout this brief unless otherwise noted.

In accordance with Mr. Arnold's position that all the agreements were illegal and that all performance thereunder must be enjoined, the terms of the decrees to be entered were changed accordingly and thereafter cleared by Mr. Arnold (App. 16b).

In addition to the 1941 investigation by the Antitrust Division, an investigation of Sterling was also conducted during the spring and early summer of 1941 under the aegis of an Interdepartmental Committee consisting of representatives of the Departments of State, Treasury and Justice, functioning under Executive Order 8389, 5 Fed. Reg. 1400 (1940), the so-called "Freezing Order" of World War II Foreign Funds Control.

This Executive Order, as originally issued on April 10, 1940, prohibited certain transactions involving property in which Norway or Denmark or their nationals had an interest, and was promulgated for the purpose of protecting that property from claims or transfers arising from duress of the Nazi invaders of those countries.* On June 14, 1941, the scope of the Freezing Order was broadened by Executive Order 8785, 6 Fed. Reg. 2897, which (among other things) added the Axis nations to the list of blocked countries, and prohibited any transfers involving property in which a German national had a direct or indirect interest, or which were made pursuant to the direction of a German national. As the Treasury Department recognized, it had become apparent that the Freezing Order was "a sharp and valuable

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* Executive Order 8389 was issued pursuant to section 5(b) of the Trading with the Enemy Act, 40 Stat. 415 (1917), as amended, 50 U. S. C. App. §5(b) (1958). The purpose of this Executive Order was made apparent in Senate proceedings relating to the amendment of that section on May 7, 1940, 54 Stat. 179; 86 Cong. Rec. 5006-09, 5168-84 (1940); S. Rep. No. 1496, 76th Cong., 3rd Sess. (1940). See, also, 41 Col. L. Rev. 1039, 1042 (1941).

weapon of economic warfare with which telling blows could be struck at the Axis powers." Treasury Department, *Administration of Wartime and Financial Property Controls of the United States Government* 3 (1942).

Termination of the Relationship.

As will hereafter be shown in greater detail, this investigation culminated in demands by the Interdepartmental Committee that Sterling rid itself of all German influence and sever all contractual relationships with I. G. Farben, by (1) discharging the top executive officers of Sterling (under whose administration Sterling had entered into and performed its 1920 and 1923 contracts with I. G. Farben), (2) acquiring I. G. Farben's interest in certain Latin American companies, including Suarry and Hegemann, and (3) terminating forthwith Sterling's aspirin business in Latin America under the trademarks which were owned by I. G. Farben and licensed to Bayer under the 1920 Contract (App. 67a-68a, 100a-105a, 13b, 41b-45b, 49b-50b). It was made clear to Sterling that the alternative to compliance with these demands by the Interdepartmental Committee was that all of Sterling's bank accounts would be frozen and it would be put out of business (App. 36b, 38b, 48b, 50b-53b, 55b).

As one of its first steps in complying with the demands of the Interdepartmental Committee (App. 68a), on August 14, 1941, Sterling cabled Farben its offer to terminate the aspirin contract (App. 68a, 105a-106a). Upon Farben's rejection of that offer (App. 106a-107a), Sterling sent an additional cable (App. 107a), which was also rejected (*ibid.*).

On August 15, 1941, Sterling's Board of Directors adopted a resolution authorizing its officers to make certain Representations to the Interdepartmental Committee (App. 68a). These Representations were in words and substance

identical* to the draft Representations which Sterling had been handed by the Interdepartmental Committee on August 13, 1941 with the demand that they be duly made and carried out by Sterling in *haec verba*, or else the consequences referred to above would follow (App. 68a, 36b, 52b-53b).**

After submission to and clearance with the Interdepartmental Committee to insure that its terms would constitute compliance with Paragraph 1 of Sterling's Representations (App. 108a, 46b-47b), a decree was entered on September 5, 1941 in a civil action brought by the Department of Justice in the United States District Court for the Southern District of New York, *United States* v. *Alba Pharmaceutical Co., supra* (App. 68a, 113a-131a). Mr. Arnold consented to entry of the decree on behalf of the United States (App. 128a). Bayer, Sterling and certain affiliates of Sterling were made defendants (App. 68a, 113a). In addition, criminal proceedings were instituted against certain officers individually, as well as against the corporations, pleas of *nolo contendere* were filed and accepted, and fines were levied (App. 16b).

The decree declared the 1920 Contract "and all agreements amendatory or supplemental thereto" between the

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* With a single exception. Paragraph 8 of the Interdepartmental Committee's draft (App. 103a) would have required Sterling to exercise a degree of control over its exports forbidden by the antitrust laws (App. 49b). This paragraph was amended in the final Representations of August 15, 1941 and the remaining paragraphs were renumbered (App. 110a). App. 101a is a misprint and should be disregarded.

** None of the foregoing facts is seriously controverted in this case by Farben. Although Farben has "reserved its position" thereon for purposes of the Stipulation (see App. 67a-68a) the facts are established by the deposition of the late James Hill, Jr., Chairman of the Board of Sterling, which Farben took prior to Mr. Hill's death. The relevant portions of that deposition were included in Sterling's printed Appendix in the Court of Appeals, copies of which have been filed in this Court.

parties unlawful under the antitrust laws and enjoined Bayer from any further performance thereof (App. 123a).* Bayer was also compelled to terminate, prior to December 31, 1941, "all arrangements" with Farben "for the distribution of aspirin, aspirin compounds or other drug products pursuant to said * * * contract as amended or supplemented", and to surrender all licenses for the use of Farben's trademarks in Latin America (App. 123a-124a). All payments by Sterling to Farben of any royalties or shares of the profits under the 1920 Contract were prohibited (App. 124a).

On that same day, the Department of Justice issued a press release concerning the consent decrees, stating:

> "* * * that the American Government's recent policy of economic pressure against Axis powers affects private contractual obligations, entered into long before the war, with contracting parties who are now Axis nationals. That conflict has created difficult legal situations for American firms engaged in foreign trade and subject to the courts of foreign countries. The arrangements made in this case constitute a constructive solution of this type of difficulty.
>
> * * * * * *
>
> "Under terms of the consent decrees, signed by Judge Mandelbaum, *all agreements between Sterling and its subsidiaries, on one hand, and between I. G. Farben and its predecessors, on the other, are declared illegal and terminated.* The decrees further provide that Sterling and its subsidiaries shall not by agreement with any other manufacturer of drugs,

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*The decree simultaneously entered in a companion action entitled *United States* v. *The Bayer Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,151 (S. D. N. Y. 1941) declared the 1923 Contracts unlawful and enjoined their further performance. That decree is dealt with in the companion case in this Court (No. 653).

> including I. G. Farben, refrain from entering into any foreign market." (App. 16b-17b).

Shortly thereafter, on September 25, 1941, Mr. Arnold, as head of the Antitrust Division, added his own comments and issued a statement, which said in part:

> "The settlement of this case was eminently satisfactory to me personally and to all the members of my staff who worked on it.
>
> • • • • • •
>
> "In this case a consent decree was necessary to invalidate *for all future time the illegal contracts on which the criminal information was founded, to prevent the German Dye Trust* [petitioner's claimed predecessor] *from relitigating the same questions in civil suits between private parties, and to prevent the reestablishment of any future relationship of the same kind between Sterling and the German Dye Trust.*" (App. 17b-18b).

No further payment of profits under the 1920 Contract was made to Farben (App. 69a).

Pursuant to the *Alba* decree and the Representations to the Interdepartmental Committee, all (more than 300) licenses under I. G. Farben's trademarks were surrendered for cancellation to the United States Attorney General under covering letters of December 30, 1941 and January 7, 1942 (App. 69a, 132a-138a). Receipt of those licenses by the Attorney General was acknowledged in letters signed by Mr. Arnold and dated December 30, 1941 and January 9, 1942 (App. 69a). Mr. Arnold's letter of December 30, 1941 stated that:

> "The Department of Justice accepts your letter of December 30, 1941, and the documents enclosed

> therewith, as performance of the requirement of * * * the final judgment * * * that prior to December 31, 1941, the Bayer Company, Inc. surrender any and all licenses for the use of trademarks owned or controlled by I. G. Farbenindustrie A. G." (App. 20b).

The trademarks under which Farben had licensed Bayer were themselves subsequently seized by the various Latin American governments as enemy property (App. 69a).

In accordance with the *Alba* decree and the Representations, and after clearance with the Interdepartmental Committee (App. 108a), all assets of Suarry were sold on November 27, 1941 to a new company, S. A. Laboratorios Suarry, owned 86% by Sterling and in which Farben had no interest (App. 70a). Similarly, all assets of Hegemann were transferred on December 27, 1941 to a new company, Laboratorios Alivtol, Ltda., owned 100% by Sterling or its subsidiaries (*ibid.*).

The Writ Should Not Be Granted.

The record shows that Farben's complaint seeks to require Sterling to take steps which Sterling has since 1941 been compelled by the United States Government, through the Representations and the *Alba* decree, to *refrain* from taking.

Farben's first cause of action seeks the recovery of a share of profits alleged to be due under the 1920 Contract for the years 1940 and 1941 (App. 9a).

The second cause of action seeks a 75% share in Sterling's present Latin American aspirin business, on the theory that this business is the same as that conducted by

Bayer in 1941 (App. 12a). Since Farben's only interest* in relation to the business as conducted in 1941 was its right to collect 75% of the profits, it is apparent that this cause of action also seeks to recover profits.

The fourth** cause of action seeks a 75% share in the two new subsidiaries through which Sterling today conducts a part of its Latin American aspirin business and which succeeded to the businesses of Suarry and Hegemann. (App. 14a). Since Suarry and the assets transferred to Hegemann were purchased pursuant to agreements in furtherance of the unlawful enterprise, and since Farben's share of the purchase price was to be paid from 75% of the profits of the acquired business and from 75% of the profits of the balance of Bayer's aspirin business in Argentina and Chile, respectively, it is apparent that this cause of action, too, seeks to recover profits under the 1920 Contract.

Payment to Farben by Sterling of any of the profits under the 1920 Contract is flatly prohibited, both (1) by the Representations, which not only required Sterling immediately to terminate and cancel all contracts with Farben but also to market its products through sales organizations with no obligation to pay royalties or profits to Farben (App. 108a, 109a), and (2) by the *Alba* decree, which specifically enjoined Sterling "from paying any royalties or share of the profits pursuant to said Latin American contract as amended or supplemented" (App. 124a).

Farben contends that the second and fourth causes of action do not seek profits but only an accounting of "prop-

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* Other than its interest in its trademarks, its Latin American distributing agencies and its facilities in Germany for manufacturing aspirin powder, none of which has been used by Sterling since 1941.

** The third cause of action, which seeks damages for breach of the 1920 Contract, has been abandoned (Pet. 13, n. 6).

erty interests" (Pet. 12, 13). Just what these "property interests" could be is nowhere explained. However, even assuming that the second and fourth causes of action may seek something other than profits, any accounting by Sterling is still barred by the Representations and by the *Alba* decree.

The second cause of action charges that the Latin American aspirin business was entrusted to Sterling in early 1941 in order to protect it, and that it was thereafter appropriated by Sterling (App. 10a). Performance by Sterling of this alleged entrusting agreement is squarely forbidden by the Representations and by the *Alba* decree. The decree declared that the 1920 Contract, as well as "all agreements amendatory or supplemental thereto" were illegal, and enjoined Sterling and its affiliates and subsidiaries from further performance of all such agreements (App. 123a). Bayer was also directed to terminate "all arrangements" with Farben "for the distribution of aspirin, aspirin compounds or other drug products pursuant to said Latin American contract as amended or supplemented" (App. 123a-24a). The Representations not only required Sterling to terminate and cancel *all* contracts with Farben, as noted above, but compelled each director and officer of Sterling to furnish a sworn statement that Sterling had carried out that requirement and held no property of any kind in trust for Farben (App. 112a).

The fourth cause of action charges that Suarry and the assets transferred to Hegemann were acquired pursuant to agreements supplementary to the 1920 Contract and that Sterling holds 75% of the successors to their respective businesses in trust for Farben (App. 13a-14a). Transfer by Sterling to Farben of any interest (or the value thereof) in the successor concerns is not only barred by the provisions of the Representations and the *Alba* decree which

have already been noted, but by a provision in the Representations (with which Sterling complied) which expressly directed Sterling to submit for the Committee's approval, and thereafter to execute, plans "to obtain complete ownership" of Farben's interest in Suarry and Hegemann (App. 109a).

I.

The issues presented by the petition are not dispositive of the case.

The requested writ of certiorari should be denied because the issues presented by the Petition are not dispositive of the case.

The only aspect of the case which Farben has asked this Court to review is the determination of both courts below that the complaint must be dismissed because it seeks enforcement of an illegal contract. Sterling respectfully submits that dismissal of the complaint is required, regardless of that determination, on, *inter alia,* at least three separate and independent grounds.

A. Farben's Action is Barred by the Trading with the Enemy Act.

As pointed out above, each of the acts, or refusals to act, of which Farben complains were required of Sterling by the Interdepartmental Committee through the Representations and the *Alba* decree.*

The Committee derived its authority from section 5(b) of the Trading with the Enemy Act, *supra.* It had been

* The *Alba* decree was submitted to, and approved by, the Committee as providing for compliance by Sterling of paragraph 1 of the Representations, which required the immediate termination and cancellation of all contracts with Farben (App. 108a, 46b-47b).

established to administer the provisions of that section on behalf of the Secretary of the Treasury, to whom enforcement thereof had been entrusted by the President, Exec. Order No. 8389, *supra*, as amended by Exec. Order No. 8785, *supra*, §§5(E), 7, acting pursuant to Section 5(b).*

Sterling is therefore protected by paragraph (2) of Section 5(b), which provides:

> "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and *no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision [section (5b)], or any rule, regulation, instruction, or direction issued hereunder.*"

Subparagraph (1)(B) of section 5(b) of the Act empowered the President, through any agency designated by him to

> "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property

* Exercise of the President's powers under section 5(b) was limited to "time of war or * * * any other period of national emergency declared by the President", 48 Stat. 1 (1933), 50 U.S.C. App. §5(b)(1)(1958). A limited national emergency had been proclaimed on September 5, 1939, Proc. No. 2352, 4 Fed. Reg. 3851, and an unlimited national emergency had been proclaimed on May 27, 1941, Proc. No. 2487, 6 Fed. Reg. 2617.

> in which any foreign country or a national thereof has any interest." (55 Stat. 839 (1941), 50 U. S. C. App. §5(b)(1)(B) (1958)).

Section 5(b) was amended to read as set forth in the foregoing quotation by section 301 of the First War Powers Act, passed on December 18, 1941, 55 Stat. 839, 50 U. S. C. App. §616 (1958). This was subsequent to Sterling's execution of the Representations. However, the effect of the amendment was made retroactive by section 302 of that Act, which provided:

> "All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917, as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are approved, ratified, and confirmed." (55 Stat. 840 (1941), 50 U. S. C. App. §617 (1958)).

These enactments constitute a clear Congressional bar against prosecution of Farben's claims.

B. Farben's Action is Barred by the so-called "Bonn Convention" between the United States and the Federal Republic of West Germany.

Since Farben's claims arise wholly from measures required of Sterling by the Government of the United States, they are also barred by the so-called "Bonn Convention"*. This convention was one of the contractual agreements terminating the occupation of West Germany. Article 1 of Chapter Nine thereof provides as follows:

---

* Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, [1955] 4 U. S. T. & O. I. A. 4504, 4411, T. I. A. S. 3425 (effective May 5, 1955).

> "Without prejudice to the terms of a peace settlement with Germany, German nationals who are subject to the jurisdiction of the Federal Republic shall not assert against countries which have signed or acceded to the United Nations Declaration of 1st January 1942, or have been at war with Germany, or are specified in Article 5 of Chapter Five of the present Convention, or against the nationals of such countries, *claims of any description arising out of actions taken or authorized by the Governments of these countries* between 1st September 1939 and 5th June 1945 *because of the existence of a state of war in Europe*, nor shall such claims be asserted in any court of the Federal Republic by any person."

C. Farben's Action is Barred by the Alternative Grounds Stated in Support of its Holding by the District Court.

In granting Sterling's motion for summary judgment, the District Court found one or more separate grounds for its decision with respect to each of Farben's causes of action.

Thus, the District Court held that the first, second and fourth causes of action, if construed as asserting claims at law, were barred by the statute of limitations (App. 290a; Pet. App. 32a, 33a), and, if construed as seeking equitable relief, were barred by the doctrine of laches (App. 290a, 291a; Pet. App. 32a, 33a-34a). In addition, it found the first cause of action, which seeks the recovery of profits under the 1920 Contract, to be barred by the *Alba* decree (App. 279a; Pet. App. 20a). Further, it ruled the second cause of action, which asks an accounting of a 75% interest in the aspirin business on the theory that it was conducted as a joint venture, to be barred because the record shows conclusively that no joint venture existed (App. 280a-81a; Pet. App. 22a-23a). Finally, the basic premise of Farben's case, i. e., that the 1920 Contract established a joint venture,

was rejected not only by the District Court (App. 280a-81a; Pet. App. 22a-23a) but by the unanimous opinion of the Court of Appeals (Pet. App. 6a).

None of the foregoing separate grounds supporting the decisions below is now presented for this Court's review. Thus, even if the Court were to grant the requested writ of certiorari, and even if it were to reach a decision different from that of the courts below concerning the effect of the illegality of the 1920 Contract, Farben's claims would still be barred.

II.

The decisions below do not conflict with this Court's decision in *Kelly* v. *Kosuga*.

Farben asserts that the decisions below conflict with "the consistent line of decisions of this Court" (Pet. 18) which allegedly culminates in *Kelly* v. *Kosuga*, 358 U. S. 516. According to Farben, those cases direct a recovery on the illegal 1920 Contract because the only effect will be the transfer of a sum of money, and neither party will be forced to engage in an unlawful activity.

Yet this is precisely what was condemned in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227. There, plaintiff, a member of an illegal combination, sought to recover the balance of the artificially high price of wallpaper sold by the combination to defendant. Recovery was denied. Said this Court:

> "The present suit is • • • based • • • upon agreements, to which both the plaintiff and the defendants were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object and which it is admitted had directly the effect, to accomplish the illegal ends • • •. If judgment be

given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." (212 U. S. at 261).

This Court's decision in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, is similarly applicable. There Pullman had acquired the rolling stock, contracts and cash of Central Transportation under an illegal lease. Central's demand for the payments specified in the lease was rejected, this Court declining to "infuse any vitality" (*id.* at 61) into the illegal agreement.

Sterling submits that, particularly in the light of *Continental* and *Central Transportation*, neither the facts nor the decision in *Kelly* supports Farben's claim. There the plaintiff sought the balance of the purchase price of 50 railroad cars of onions. A defense was interposed that the sale was made pursuant to, and as an indivisible part of, an agreement in violation of section 1 of the Sherman Act, *supra*. The facts alleged in the answer, which were taken as true for purposes of plaintiff's motion to strike the defense, were that both plaintiff and defendant were marketers of onions, and that plaintiff and his associate had informed defendant and others that they owned or controlled 1,000 cars of onions which they would deliver on the futures exchange for the purpose of depressing the futures price and the cash market price of onions, unless defendant and others agreed to purchase a substantial part thereof.

Defendant and the others therefore agreed to purchase the required amount, and plaintiff and his associate agreed to withhold deliveries from the futures market for the balance of the trading season. Defendant and the other purchasers agreed themselves not to deliver any of the

onions purchased from plaintiff and his associate on the futures market for the remainder of the season; this was done "for the purpose of creating a false and fictitious market condition", and "to fix the price of onions and limit the amount of onions sold." (358 U. S. at 517).

Defendant had taken delivery of some, but not all, of the purchased onions, and had also made some payments on account of the sale. The District Court entered summary judgment for the plaintiff for the unpaid purchase price; its decision was affirmed by the Court of Appeals for the Seventh Circuit and by this Court.

It is difficult to see the applicability of *Kelly* to the instant situation. That case involved a suit on a simple purchase and sale agreement, fully completed except for defendant's refusal to pay. Thus the Court, at the outset of its discussion of the legal principles involved, noted:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser *in an action to recover* from him *the agreed price of goods sold.*" (*Id.* at 518).

There is no sale of goods before this Court in this case. The facts of *Kelly* are analogous to the situation which might have arisen if, in the 1920's or the 1930's, prior to the *Alba* decree, Bayer had refused to pay for aspirin powder manufactured in Germany and delivered to Latin America for Bayer's account under the 1920 Contract. Such a simple situation of goods sold and delivered would have come within the careful language of the Court, which emphasized that the transaction before it was confined to "a lawful sale for a fair consideration [which] constitutes an intelligible economic transaction in itself * * *." (*Id.* at 521). The

contrast between such a transaction and the complex of claims arising from Farben's 21-page complaint is obvious.

The Court's decision in *Kelly* was based on its refusal to add a new sanction, *i.e.*, the avoidance of private contracts, to the antitrust sanctions explicity set forth in the Sherman Act, except where doing so is necessary to avoid enforcement of unlawful conduct. It said:

> "Past the point *where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act*, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it'. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra*, at 271 (dissenting opinion). Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 754-54, is avoided by treating the defense [of illegality] as so confined." (*Id.* at 520-21).

First, of course, avoidance by Sterling of the terms of the 1920 Contract is not the imposition of a new sanction. A new sanction would be imposed only if Farben's claims were upheld. Those claims necessarily rest upon Sterling's refusal, following entry of the *Alba* decree in 1941, to continue any longer in an admittedly illegal long-term and largely executory contractual relationship. To afford Farben relief would be to impose a penalty upon Sterling for *refusing* to engage in "the precise conduct made unlawful by the Act."

Second, as will be shown under Point III, *infra*, the Holmesian principle stated above is not involved in this case because Sterling has already given back to Farben what Farben contributed under the 1920 Contract.

Third, in the present case the "judgment of the Court [sought by Farben] *would* itself be enforcing the precise conduct made unlawful by the Act," *i.e.*, the payment of money for illegal consideration. *Kelly* involved, as pointed out, *supra*, a simple sale of goods of the type continuously entered into in the marketplace. There was no allegation that the price sued for was unreasonable or had been unlawfully fixed; on the contrary, the Court found before it "a completed sale of onions at a *fair* price." (*Id.* at 521). The problem with which the Court was concerned arose only out of the background against which the sale was made. The plaintiff in *Kelly* did not seek to enforce the unlawful non-delivery agreement. Had such a request been made, the Court noted that it would have been denied.

Here, it is precisely such enforcement of the unlawful contract that is requested. By the terms of the 1920 Contract, Farben refrained from further competiton in Latin America with Sterling, in return for a share of Sterling's profits. An illegal enterprise resulted, which developed, as Farben admits, "a large and profitable business" (App. 8a). Claiming that the enterprise still exists, Farben now brings an action for an accounting of the alleged spoils under the illegal 1920 Contract, which is pleaded in each of its causes of action. This Court cannot uphold the accounting sought by Farben without recognizing, reviving and enforcing that illegal agreement, and without using its judicial power to reward the very conduct proscribed by the antitrust statutes.

This is just what was condemned in *Continental*. There the Court held that judgment for the excessive purchase price fixed pursuant to an unlawful conspiracy would have made the Court a party to the carrying out of one of the very restraints forbidden by the Sherman Act. The *Con-*

tinental doctrine was expressly reaffirmed by the Court in *Kelly*.

In an effort to distinguish *Continental* and *Central Transportation*, Farben asserts that the only illegal consideration exchanged in the 1920 Contract was Sterling's, not Farben's, covenant not to compete (Pet. 19, 23). However, as pointed out in Point III, *infra*, the 1920 Contract was a part of a world-wide division of pharmaceutical markets and Farben's participation therein was equally unlawful.

Fourth, in *Kelly* the Court gave great weight to the practical difficulties inherent in permitting a private party to avoid an obligation to pay for goods sold and delivered on the ground that the contract pursuant to which the goods were sold and delivered was in some way in violation of the antitrust laws, citing *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, another decision which permitted recovery of the purchase price of goods sold and delivered. There Mr. Justice Jackson pointed out that the sanction of denying the purchase price under contracts in violation of the antitrust laws would not only end the business of antitrust violation; it would end all business. Were the defense to be sustained, every suit for goods sold and delivered would be converted into an antitrust proceeding, thus imposing an impossible burden upon the conduct of business. The result in *Kelly*, then, is in part attributable to practical reasons and should not be deemed controlling when the practical reasons are absent.

III.

The decisions below have no undesirable effect on international trade.

Farben claims (Pet. 26) that it could not have known of the illegality of the 1920 Contract at the time of its execution. The argument is made that American antitrust law did not then forbid an agreement between American and foreign firms to refrain from competing with a joint business enterprise conducted by them in a third country (*ibid.*).

Farben seeks to treat the 1920 Contract as if it were executed as an isolated transaction. That contract, however, was only the first of a series of steps by Farben and Sterling to accomplish a division of the world's pharmaceutical markets, which division was completed with execution of the 1923 Contracts. Sales by Bayer of aspirin in Latin America under the 1920 Contract were specifically recognized in the 1923 Contracts (*e.g.*, App. 86a).

Certainly the relationship among the contracts was clear in 1941 to the Department of Justice, acting through Mr. Arnold, and to the United States District Court for the Southern District of New York. The complaint filed by the Department of Justice and signed by Mr. Arnold (App. 113a-21a) charged that a conspiracy in restraint of trade had existed and that *both* the 1920 Contract and the 1923 Contracts had been executed in furtherance of that conspiracy (App. 117a-19a). The decree, also signed by Mr. Arnold (App. 128a), declared all of the contracts unlawful (App. 123a, 124a).

That these contracts were regarded as particularly flagrant breaches of the antitrust laws in 1941 is evidenced by the fact that in addition to the civil suits in which consent

decrees were entered, criminal proceedings were instituted by the Antitrust Division under Mr. Arnold's direct supervision against Sterling, and against its top executives individually. In the criminal cases, pleas of *nolo contendere* were filed and accepted, and fines levied (App. 16b).

Farben not only claims that the 1920 Contract must be examined standing alone; it also argues (Pet. 19, 23) that the only illegality of that agreement inhered in Sterling's covenant not to compete, and that apart from Sterling's covenant Farben's own participation did not violate the antitrust laws. This argument, too, has been previously refuted by Mr. Arnold. In a press release issued September 5, 1941, the date of entry of the consent decrees, he stated the following as the view of the Department of Justice:

> "It is our view that all of these contracts are illegal *in their entirety* and that any consent decree entered in this case must declare the contracts to be illegal *in their entirety* and enjoin their future performance." (App. 16b).

Even if Farben could establish that at all times it was ignorant of the illegality of the 1920 Contract under the United States antitrust laws, it could not prevail. A similar allegation was rejected by the courts below in *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F. R. D. 349 (D. N. J. 1948), *aff'd*, 176 F. 2d 90 (3rd Cir. 1949). There plaintiff sought the reformation of an agreement licensing it to use certain patents and containing price-fixing provisions in violation of the Sherman Act. Despite plaintiff's allegation that it accepted the patent license not only in ignorance of the Act but also in reliance upon defendant's representation that the license was lawful, reformation was refused. Said the District Court:

> "Is it an avoidance or a sufficient answer in law to allege that one entered into a contract in good

faith, but in ignorance of the law making the contract void as against public policy? The answer to this is no; ignorance of the law, under such conditions, is no excuse. 'Acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.' United States *v.* Paramount Pictures, 334 U. S. 131, 68 S. Ct. 915, 931.

"* * * Nor is plaintiff's position strengthened by alleging that it relied upon defendant's assertion that the agreement was valid, since the Sherman anti-trust law speaks in the public interest to the contrary and in a louder and more commanding voice." (8 F. R. D. at 353-54).

Finally, Farben is simply wrong when it construes the decisions below as permitting the appropriation by one party to an enterprise of contributions by another party. The record shows conclusively that Sterling no longer has anything provided by Farben under the 1920 Contract.

The only contributions made by Farben to the aspirin business conducted by Bayer were licenses under certain of its trademarks (App. 15a), the use (for which Bayer paid) of Farben's local Latin American agencies and its manufacturing facilities in Germany (App. 16a, 17a), and its covenant not to compete (App. 16a, 18a).

It has been stipulated that Bayer's licenses under Farben's trademarks were disclaimed by January 7, 1942 (App. 69a, 132a-38a). It has also been stipulated that, at about the same time, Bayer terminated its use of Farben's agencies (App. 70a). Sterling obviously does not now have, and has not had since 1939 (App. 64a), the use of Farben's manufacturing facilities. Finally, with respect to Farben's covenant not to compete, Sterling is of course barred from enforcing that covenant by the provisions of the Representations and the *Alba* decree, and no claim of actual enforcement is made by Farben.

Rather than permitting, the decisions below prevent the appropriation by one party of another party's property. Sterling was compelled in 1941 to surrender without compensation the licenses under Farben's trademarks for which it had already paid. For all practical purposes, this gave Sterling's aspirin business to Farben for nothing. Farben was unable to realize the benefit of this surrender only because of World War II. Since 1941 Sterling has built a new business under new trademarks. It is this business which is sought to be appropriated by Farben.

In these circumstances, it is apparent that the decisions below have no undesirable effect on international commercial relationships, and review by this Court is not warranted.

Conclusion.

For the reasons stated, the writ should be denied.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Respondent,
80 Pine Street,
New York 5, New York.

Of Counsel:

GEORGE S. HILLS,
41 East 42nd Street,
New York 17, New York.

ROBERT G. ZELLER,
WILLIAM A. JANSEN,
80 Pine Street,
New York 5, New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 652

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG, INC., *Respondent*
(Accounting case)

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THURMAN ARNOLD
MILTON V. FREEMAN
EDGAR H. BRENNER
WERNER J. KRONSTEIN
ARNOLD, FORTAS & PORTER
1229 - 19th Street, N.W.,
Washington 6, D. C.
Attorneys for Petitioner

January 17, 1963

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REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. SINCE THIS CASE INVOLVES AN IMPORTANT RULING IN CONFLICT WITH THE DECISIONS OF THIS COURT, CERTIORARI SHOULD BE GRANTED EVEN IF, AS URGED BY RESPONDENT, RESPONDENT MIGHT PREVAIL ON OTHER GROUNDS NOT RULED ON BY THE COURT BELOW.

The Third Circuit decided this case against petitioner on the sole basis that recovery by petitioner was barred because the 1920 agreement contains provisions violative of the antitrust laws of the United States. No other ground was relied on or even mentioned by the Third Circuit.

Petitioner asked for certiorari because the decision of the Third Circuit is in conflict with the decision of this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, as well as with earlier decisions of this Court, and represents a far-reaching and disturbing precedent affecting international trade.

Respondent's brief in opposition to the petition is not, however, directed to the issues presented by the decision of the Third Circuit. It deals almost entirely with the assertion that certiorari should not be granted because the Court of Appeals could have disposed of this case on other grounds not decided by that Court. This appears to be a recognition by respondent that the decision of the Court of Appeals on the only ground therein relied upon is contrary to the rulings of this Court, as urged in the petition herein. Respondent, apparently not confident of the legal basis for the Third Circuit's decision, argues that the Third Circuit could have decided the case on grounds which would be less likely to be reviewed by this Court. This we submit is nothing more than an attempt to escape the issue presented by this case.

It is plain that the question whether the Third Circuit could have decided this case on other grounds is completely irrelevant to the grant of certiorari. The Third Circuit decided this case on the sole ground that petitioner could not recover because the 1920 agreement contained a noncompetitive provision. It is this decision which establishes a legal precedent dangerous to the security of property rights in international trade. It is this decision which must make foreign companies reluctant to enter into long-term agreements with American firms. For if, contrary to reasonable expectations, at some later date, any provi-

sion of the agreement should be held to violate the antitrust laws, the American partner is free to appropriate all property rights arising or transferred under the agreement. It is this decision which may be turned against American companies when an agreement with a foreign firm is found to violate the newly-enacted antitrust laws of the Common Market, Germany or other countries. It is this decision which is in plain conflict with the line of this Court's decisions culminating in *Kelly* v. *Kosuga, supra.*

It is this decision which requires review. The question whether such review should be granted is one entirely apart from the ultimate right of respondent to prevail upon other grounds.

If, as respondent contends, it should have prevailed on some other ground not relied upon by the Third Circuit, then it should prevail on that ground and not on a ground which is contrary to the decisions of this Court and which establishes a harmful legal precedent. It will have ample opportunity to raise other grounds in its defense after reversal by this Court of the erroneous decision of the Third Circuit and remand for further proceedings.

II. THE GROUND RELIED UPON BY THE THIRD CIRCUIT.

Even with respect to the only ground relied on by the Third Circuit in its decision, respondent does not attempt to support the decision below, but places strong reliance on arguments not considered or decided by the Third Circuit.

A. Respondent urges that there is no conflict with *Kelly* v. *Kosuga, supra,* because this Court's decision in *Kelly* was based on "its refusal to add a new sanction on, i.e., the avoidance of private contracts, to the

antitrust sanctions explicitly set forth in the Sherman Act. . . ." It then states that no new sanction is added here because the 1920 Contract had been avoided by the Consent Decree. (R. Br. 25) The court below, however, in the decision sought to be reviewed made no mention of this point. Sterling ignores the fact that the sanction imposed on petitioner, as expressly stated in the opinion below, is the forfeiture of German Bayer's property rights including, for example, its conceded 75 percent interest in Laboratorios Hegemann. The Court below did not hold that petitioner had no such rights. It said petitioner could not enforce these rights because the 1920 contract contained a provision violative of the antitrust laws.

B. Sterling states that the decision of the Third Circuit is not a precedent for the appropriation of property rights and that it does not present a case of "getting other peoples' property for nothing," (*Kelly* v. *Kosuga*, 358 U.S. 521) because as Sterling claims it has already given back to petitioner everything that petitioner contributed under the 1920 Contract (R. Br. 25, 30).

Sterling, however, has conceded and the Third Circuit found, that it has in fact retained property owned by petitioner—for example, the 75 per cent interest in Laboratorios Hegemann. As stated above, the Third Circuit did not hold petitioner had no claims for property rights but ruled that it could not assert these claims. In the accounting which would take place upon reversal and remand by this Court, respondent may, of course, show that it owes little or nothing to petitioner. But the only issue here is whether petitioner is barred from receiving such an accounting because the 1920 agreement contained a provision violative of the antitrust laws.

III. RESPONDENT WOULD BE MOST UNLIKELY TO PREVAIL ON THE ALTERNATIVE GROUNDS WHICH IT HAS RAISED BUT WHICH WERE NOT CONSIDERED BY THE COURT OF APPEALS

As shown under section I, *supra*, there is no reason for this Court even to consider the alternative grounds on which respondent claims it could have, though it did not, prevail below. As stated above, these questions can and should be raised by respondent in the lower courts upon remand after reversal of the decision below which is in conflict with the decisions of this court. To assure this Court, however, that respondent's prevailing on this alternative grounds is not as it seems to urge a foregoing conclusion but in fact a most unlikely possibility, we should like to comment very briefly on the grounds which petitioner has raised.

1) Most of respondent's brief is devoted to the argument that petitioner is barred from recovery in this action by the Trading With the Enemy Act and by the Bonn Convention. Although these points were raised in both lower courts, neither court saw fit even so much as to comment on these arguments. This is not surprising. Respondent's argument that petitioner's claims are barred by the Trading With the Enemy Act and by the Bonn Convention are both premised upon what are indeed unlikely propositions: These are (1) that under the Trading With the Enemy Act the Government could authorize a private citizen to plunder enemy property, and that the Act was not limited to seizure by the Government, and (2) that the Bonn Convention which restored sovereignty to Germany should be construed to deprive German citizens of pre-existing rights. Merely to state these propositions is to show how baseless they are and how likely it is that they would be rejected if presented, as they should be, to the lower courts on remand.

2) The respondent also relies on the fact that the decision of the District Court held that this cause of action was barred by the Statute of Limitations and Laches. This ground was, of course, not relied upon nor even mentioned in the opinion of the Court of Appeals. That this suit was filed too late contrasts strangely with the previous argument that the suit was prematurely rejected in *Farbenfabriken Bayer A.G.* v. *Sterling Drug Inc.*, 251 F. 2d 300 (3d Cir., 1958), cert. denied, 356 U.S. 957. It is equally baseless.[1]

CONCLUSION

This case presents an important issue arising from a decision below which is in conflict with decisions of this Court. Accordingly, this Court should grant certiorari.

Respectfully submitted,

THURMAN ARNOLD
MILTON V. FREEMAN
EDGAR H. BRENNER
WERNER J. KRONSTEIN

ARNOLD, FORTAS & PORTER
1229 19th Street, N.W.
Washington 6, D. C.

Attorneys for Petitioner

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[1] This defense was based on the theory that petitioner, as an enemy national, could have maintained this action some time prior to the official termination of the war, in October 1951, pursuant to House Joint Resolution #289, approved on October 19, 1951 and proclaimed by the President of the United States on October 24, 1951, entitled "Joint Resolution to Terminate the State of War Between the United States and the Government of Germany," 50 U.S.C.A. App. preceding Section 1, p. xx. The President's message urging Congress to adopt this Resolution however expressly stated that such a declaration was required to remove "certain disabilities, particularly with respect to suits in the United States Courts." 1951 U.S. Cong. and Admin. Service 867, 868.